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TORTIOUS LIABILITY OF CANADIAN PHYSICAL EDUCATION AND RECREATION PRACTITIONERS

by

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A THESIS

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "Tortious Liability of Canadian Physical Education and Recreation Practitioners" submitted by R. Thomas Brunt in partial fulfillment of the requirements for the degree of Master of Arts.

ABSTRACT

The purposes of this study were to identify and analyze the principles of case law and statutory law as they affect the Canadian physical education and recreation practitioner, and to record the highlights of all reported related Canadian cases.

The review of literature disclosed some errors in previous related studies, and also points upon which the interpretation of the courts has been modified or reversed.

The relevant principles of law have been interpreted and expressed in statements generally unencumbered by legal terminology.

A series of recommendations arising from the study have been incorporated into the body of the text.

ACKNOWLEDGEMENT

The writer is most appreciative of the assistance and encouragement given by members of his committee who have so carefully guided this study since its inception; Dr. S. Mendryk (Chairman), Dean M.L. Van Vliet, and Mr. J.S. Williams. Also to Dr. S.P. Khetarpal who, with very little notice, kindly agreed to serve on the examining committee in Professor Williams' absence.

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CHAPTER I

INTRODUCTION

For many years Canadians have heard and read about court decisions in the United States in which individual teachers have been found negligent and required to pay many thousands of dollars in damages to the plaintiffs. However, cases which have arisen in Canada were usually not as widely publicized and therefore have not been as well known. For this reason, many professionals in the physical education and recreation field may not be aware of the legal hazards of their position. A review of the course descriptions contained in many calendars of Canadian universities offering degrees in physical education does not indicate any specific attempts to draw attention to these hazards.

Liability cases involving large amounts of money have been before the courts in Canada, however. An example is a recent decision of the Court of Queen's Bench, Judicial Center of Regina, in which the plaintiff was awarded $183,900 as a result of an accident on the parallel bars during a special physical education class.[1]

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[1] McKay v. Board of Govan School Unit (1968) 64 W.W.R. 301 reversing (1967) 60 W.W.R. 513. (In this case, a high school teacher had volunteered to supervise the gymnastics part of a school demonstration night. This involved practices each noon hour in which he was to assist and instruct the students. The boys who had volunteered to participate in the gymnastics display had asked to use the parallel bars and so were doing some work on them. On the day of the accident, they had a calisthentics and tumbling warmup and had then placed mattresses around the parallel bars and commenced practicing. McKay was apparently attempting a forward roll dismount when he fell through the bars landing on his head, suffering a broken neck, causing permanent paraplegia. There were two spotters, but they had not been properly instructed in

It would seem reasonable to assume that an understanding of one's legal position and a knowledge of some appropriate court decisions would be useful information for the practitioner. This kind of information would permit him to evaluate from a new perspective his methods and program content, and the equipment and facilities which are the tools of his trade. In examining his position in this way it might be possible for him to reduce or eliminate many of the potentially selfincriminating practices. Such a knowledge is particularly essential if the practitioner is or aspires to be the administrator of any large department or school.

1. STATEMENT OF THE PROBLEM

At present, there is no single publication which brings together a Canadian summary of the statutory law or case law as it affects the practitioner in the fields of recreation and physical education.

This study will attempt to identify and analyze the principles or case law and statutory law as they affect the Canadian practitioner. An effort will be made to record and describe the highlights of all reported related Canadian cases, and from these to make a series of recommendations which may serve as guidelines for the individual who is involved with planning and implementing program. These recommendations will be embodied throughout the report.

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what to do. McKay had swung back and forth a number of times before attempting the stunt when he fell. The court found the school board liable for damages amounting to $183,900).

2. RELATED RESEARCH

There are a number of surveys which have been conducted in the United States which relate to this area. Unfortunately, the laws vary so greatly from state to state that it is very difficult to make useful comparisons or draw generalizations from them. Some use will be made of these studies in terms of organizing this project, but they will not be used in the development of legal principles.

There are primarily four Canadian studies which have a major bearing on the current study, three of which have been completed at the University of Alberta. The first of the four is by Lamb[2] and involves a survey of liability for school accidents. Of the three related studies completed at the University of Alberta, the first is by Bargen,[3] who, from an analysis of numerous court cases outlined the legal principles affecting the pupil's individual rights and responsibilities and developed the concepts of statute law and common law as they affect the Canadian public school pupil. It was apparently a result of this study that the Enns[4] and McCurdy[5] studies were undertaken, as they are

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[2]Robert L Lamb, "Legal Liability of School Boards and Teachers for School Accidents" (unpublished Master's thesis, O.C.E., University of Toronto, 1957).

[3]Peter F. Bargen, "The Legal Status of the Canadian Public School Pupil" (Doctoral dissertation, University of Alberta, 1959, and published by MacMillan of Canada, 1961).

[4]Frederick Enns, "The Legal Status of the Canadian Public School Board" (Doctoral dissertation, University of Alberta, 1961, and published by MacMillan of Canada, 1963).

[5]Sherburne C. McCurdy, "The Legal Status of the Canadian Teacher" (unpublished Doctoral dissertation, University of Alberta, Edmonton, 1964).

a development of Bargen's recommendations for further study.[6]

The Enns study,[7] as the title suggests, has examined the statutes and case law as they affect the school board, and has summarized the legal principles relative to school boards.

The primary purpose of the McCurdy thesis was to determine the nature of the legal ralationships which affect the school teacher "and so to discover, in broad terms, the legal status of the Canadian teacher."[8]

The final Canadian resource which was applicable to this thesis is by Keith[9] and primarily deals with the Province of New Brunswick, although cases from throughout Canada are cited as reference.

In comparison to these few studies of related research dealing with the Canadian scene is the enormous number which have been completed in the United States, and which thereby reflect the concern felt by professionals in that country as regards liability. Many of the studies which

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[6]Bargen, op. cit., p. 273.

[7]Enns, loc. cit.

[8]McCurdy, op. cit., p. 4.

[9]M. Virginia Keith, "The Legal Status of the School Board in the Province of New Brunswick" (unpublished Doctoral dissertation, University of Ottawa, 1961).

have been completed deal with one specific state[10] or area.[11] Yet others have attempted to cover at least some aspect of the total United States.[12] Very limited use has been made of these studies in the preparation of this thesis.

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[10]S.M.K. Alexander, "An Analysis of the Laws Affecting Public School Administrative and Teacher Personnel in Kentucky" (unpublished Doctoral dissertation, Indiana University, 1965); Dan Edgar Lacy, "Teacher Liability in Physical Education in California" (unpublished Doctoral dissertation, Stanford University, 1960); Fred J. Rhode, "Tort Immunity and Iowa School Districts" (unpublished Doctoral dissertation, Iowa State University, 1965); Donald L. Sudbrink, "Legal Liabilities of Physical Education Teachers of the Public Schools in the State of Maryland" (unpublished Master's thesis, University of Maryland, 1965); Lewis Chapman Wood, "A Study of Tort Liability in Michigan School Districts" (unpublished Doctoral dissertation, Michigan State University, 1962); Elizabeth Elinor Widger, "Laws, Court Decisions, and Regulations Pertaining to Health, Physical Education, and Recreation in the Public Schools of Pennsylvania" (unpublished Master's Thesis, The Penn State College, 1946).

[11]Joseph Eugene Perrotta, Jr., "An Examination of School Tort Law in Selected Atlantic and Northeastern States and the Implications for Education Therein" (unpublished Doctoral dissertation, Rutgers University, 1965).

[12]Joseph J. Birmingham, "Tort Liability of Municipalities in Pennsylvania for Public Work and Recreation Services" (unpublished Master's thesis, Pennsylvania State University, 1960); Nathan Doscher and Nelson Walke, "The Status of Liability for School Physical Education Accidents and Its Relationship to the Health Program" Research Quarterly, 23:280, October, 1952; Leslie Robert Fisher, "An analysis of Patterns of Liability Decisions in the Public Schools of Selected States in the United States" (unpublished Doctoral dissertation, University of Oklahoma, 1963); Peter J. Graham Jr., "A survey of Liability Insurance for Physical Education Teachers Within the United States" (unpublished Master's Thesis, Michigan State University, 1965); Robert Duane Hartman, "The Nonimmunity of School Districts to Tort Liability" (unpublished Doctoral dissertation, University of Illinois, 1963); John J. Kirk, "An Analysis of State Laws Affecting the Operation of Children's Summer Camps in the United States with a Suggested Universal Legislative Program" (unpublished Doctoral dissertation, University of Michigan, 1963); Ray Charles Lemley, "Tort Liability of Public Schools" (unpublished Doctoral dissertation, East Texas State University, 1964); Robert James

3. DELIMITATIONS OF THE STUDY

1. This study is concerned with the tortious liability of the professional in the recreation and physical education fields. It does not deal with the legal status of the pupil, the teacher, or the school board. Persons requiring information regarding these areas are directed to the dissertations previously cited.

2. A number of references are made to the proceedings of English and American Law Courts in lieu of adequate Canadian material to develop a particular point.

3. Undoubtedly, there is a great amount of statutory law affecting the physical education and recreation practitioner in one way or another. Nevertheless, no attempt has been made to develop this aspect to any greater extent than as it relates directly to legal liability.

4. No attempt will be made in this study to deal with that liability which arises out of contract with suppliers and other contractors.

Marshall, "The Duties and Liabilities of Public School Teachers as Evidenced by Court Decisions" (unpublished Doctoral dissertation, University of Pittsburgh, 1963); David Vance Martin, "Trends in Tort Liability of School Districts as Revealed by Court Decisions" (unpublished Doctoral dissertation, Duke University, 1962); J. David Mohler, "Legal Aspects of Extra-curricular Activities in Secondary Schools" (unpublished Doctoral dissertation, Duke University, 1965); L.L.Palmer, "A Study of Athletic Insurance Plans" (unpublished Master's thesis, University of Utah, 1955); John E. Soich, "Analysis of Tort Liability of School Districts and/or Its Officers, Agents, and Employees in Conducting Programs of Physical Education, Recreation, and Athletics" (unpublished Doctoral dissertation, University of Pittsburgh, 1964); Marc Guley, "The Legal Aspects of Injuries in Physical Education and Athletics" (unpublished Doctoral dissertation, Syracuse University, 1952).

5. This study does not deal with the law as it affects the practitioner in the province of Quebec.

4. LIMITATIONS OF THE STUDY

1. The information collected for the study is intended to serve as a guide to physical educators and is not intended as an absolute legal reference.

2. Many cases which arise are settled out of court and consequently are never recorded.

3. Many cases which do reach the courts are not recorded as no new points of law or legal concepts are involved in the view of the editors of the legal journals and reports.

4. Many of the cases to be used will be from outside Canada, and though the courts may refer to these cases, they are not necessarily binding.

5. An attempt will be made to make certain inferences from the cases concerning possible interpretations involving related issues. These may or may not coincide with the findings resulting from an actual case taken to a Court of Law for litigation, and they should not be so construed.

6. Situations not dealt with such as contracts could alter decisions suggested by this thesis.

5. SOURCES OF INFORMATION AND METHOD FOLLOWED

The system of organization of the various aspects of liability has been patterned from a composite of other theses and various texts on tort law.[13] Within this general framework the following publications have been used extensively in locating Canadian cases to illustrate each principle:

1. The Canadian Abridgement
2. The Canadian Bar Review
3. McGill Law Journal
4. Canadian Encyclopedia Digest [Western]
5. Index to Legal Periodicals

6. THE USE OF CASE LAW

Generally common law follows the practice that where a decision in a particular jurisdiction has been reached, a precedent is established which is followed in that jurisdiction in subsequent similar circumstances. This is not an ironclad rule, however, and can be disregarded in the event that the court feels the decision is unreasonable or must now be altered due to a shift in social patterns.[14]

In this regard Lord Finlay has said:

> No inquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together. The use of cases is for

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[13] William L. Prosser, Handbook of the Law of Torts (third edition; St. Paul: West Publishing Co., 1964); John G. Fleming, The Law of Torts (third edition; Sydney: The Law Book Company of Australasia Pty Ltd., 1965).

[14] Prosser, op. cit., p. 209.

> The propositions of law they contain; and it is no use to compare the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case.[15]

A hierarchy of authority exists in respect to what has been stated or decided in other courts. In general, higher courts bind lower ones and some courts in some instances bind themselves.[16] Furthermore, a decision of the court of one country may have more persuasive power than a court of the country in which the trial is taking place. An example of this situation might be the decision of a Court of Appeal of England which almost certainly would be more persuasive than an opposing decision of a district court in Canada. Other factors which affect the weight of a decision are:

1. The eminence of the judge(s);
2. The number of judges;
3. Strong dissenting judgments of one or more of the judges;
4. Disagreement in the reasoning used by the various judges even though the decision reached by each is the same;
5. Failure of counsel to cite an inconsistent case in the arguments;
6. Low repute of the reporter (this refers to old cases);
7. Disapproval of the profession, and;

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[15] Thomson v. Inland Revenue, (1919) S.C. 10 as cited by W.T. Stallybrass (ed.), Salmond's Law of Torts, (tenth edition; London: Sweet & Maxwell, 1945), P. 443.

[16] Enns, op. cit., pp. 33-36.

8. The appeal court went off on another point.[17]

A final and very important consideration which affects the weight of a particular argument is with respect to the circumstances in which a judge may have made a particular statement which is being cited. An attorney might choose to quote a statement which had been made by a judge during the trial proceedings which would in most instances not have nearly as much persuasive power as the statement containing a point of law upon which another judge has based his decision.[18]

This hierarchy of authority should be kept in mind in reviewing the cases cited. In many instances it has been necessary to use cases which are not Canadian, and in some instances cases which are not even related to physical education and recreation, in order to develop points of law which are considered to be important.

7. DEFINITIONS OF TERMS

Common Law. As it is most often used and for the purpose of this treatise, common law is that section of the law which is unwritten and has been passed down through customs or by decisions of Courts of Law. To quote from Jowitt:

> It is sometimes used in contradistinction to statute law, and then denotes the unwritten law, whether legal or equitable in its origin, which does not derive its authority from any express declaration of the will of the legislature. This unwritten law has

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[17]Glanville Williams, Learning the Law, (London: Stevens & Sons, 1963), p. 88.

[18]See also ratio decidendi and obiter dictum, infra, p. 12, 13.

> the same force and effect as the statute law. It depends for its authority upon the recognition given by the courts to principles, customs, and rules of conduct previously existing among the people. This recognition was formerly enshrined in the memory of legal practitioners and suitors in the courts; it is now recorded in the law reports which embody the decisions of the judges together with the reasons which they assigned for their decisions. . . . The common law is also used to mean general customs, or those applicable to and governing the whole Kingdom. . . . With reference to the subject with which it deals, the common law is divided into civil and criminal; the former includes the two great branches of private rights arising out of contracts and torts; the latter deals with crimes.[19]

Negligence. Lord Atkin, in the famous case of Donoghue v. Stevenson,[20] explained that "you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." Thus to quote Jowitt,[21] negligence is "a breach of legal duty to take care which results in damage, undesired by the defendant, to the plaintiff." This is further explained in relation to common law and statute law:

> Negligence is the breach of a legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. . . . The only difference is that in the one case the measure of legal duty is to be determined upon common law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence per se. . . . All

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[19]Earl Jowitt, The Dictionary of English Law (London: Sweet & Maxwell, 1959), p. 426.

[20]Donoghue v. Stevenson [1932] A.C. 562 (in which a lady recovered damages for illness incurred as a result of drinking a bottle of ginger beer which contained a snail).

[21]Jowitt, op. cit., p. 1215.

> that the statute does is to establish a fixed standard by which a fact of negligence may be determined.[22]

Or finally, to quote from an often cited case of 1856, "negligence is the omission to do something, which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do."[23]

Neighbour. Quoting Lord Atkin again as he explains who is considered to be your neighbour:

> The answer seems to be, persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[24]

Obiter Dictum. This may be a chance remark of a judge or a suggested rule which is not necessarily a part of the decision of the case. Its usefulness depends to a great extent upon how highly regarded is the judge who made the statement.[25] Cross[26] explains obiter this way:

> . . . a statement by the way, and the probabilities are that such a statement has received less serious consideration than that devoted to a proposition of law put forward as a reason for the decision.

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[22]Osborne v. McMasters, 1889, 40 Minn. 103, 105, 41 N.W. 543, 544, 12 Am. St. Rep. 698 (where a druggist sold a bottle of poison without labelling it as such, and as a result of which a man died from drinking the contents).

[23]Blyth v. Birmingham Waterworks Co. (1856) 11 Ex. 781, 784, 156 E.R. 1047 (in which an exceptional frost caused damage to a fire plug resulting in flooding of the plaintiff's basement. The fire plug was the best available and the installation without fault. The result was considered an accident).

[24]Ibid.

[25]Williams, op. cit., p. 82.

[26]Rupert Cross, Precedent in English Law (Oxford: The Clarendon Press, 1961), p. 43.

Ratio Decidendi. This is "the rule of law upon which the decision is founded,"[27] in the case of precedent. It is "the material facts of the case plus the decision thereon."[28]

Reasonable Man. It has almost become tradition among lawyers to attempt to show that an individual has or has not acted as the so-called "reasonable man" would be expected to do. A. P. Herbert, an English lawyer has satirically described the reasonable man in an imaginary case, Fardell v. Potts:

> He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen. . . . He is at every turn, an ever-present help in time of trouble, and his apparitions mark the road to equity and right. . . . The Reasonable Man is always thinking of others; prudence is his guide. . . . He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching a trap door or the margin of a dock . . . who never mounts a moving omnibus, and does not alight from any car while the train is in motion. . . and will inform himself of the history and habits of a dog before administering a caress; who believes no gossip, nor repeats it, without firm basis for believing it to be true; who never drives his ball till those in front of him have definitely vacated the putting-green which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, his neighbors, his servants, his ox, or his ass . . . who never swears, gambles or loses his temper; who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean. Devoid in short of any human weakness, with not one single saving vice, sans prejudice, procrastination, ill-nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow citizens to order their lives after his own example.[29]

Res Ipsa Loquitur. Means "the facts speak for itself."[30]

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[29] A. P. Herbert, Uncommon Law (London: Methuen & Co. Ltd., 1952, reprinted), pp. 3, 4.

[30] Jowitt, op. cit., p. 1521.

Statute Law. It is that portion of the written law composed entirely of "an edict of the legislature; an Act of Parliament."[31]

Tort. A tort is a civil wrong of some nature, which does not involve a contract. Williams[32] describes it as "a civil wrong independent of contract." Jowitt[33] further explains that it is "an act which gives rise to a right of action, being a wrongful act or injury consisting in the infringement of a right created otherwise than by contract."

Volenti Non Fit Injuria. This means that the individual "freely and voluntarily faced a known risk."[34] Lamb[35] has construed this to mean that "that to which a man consents cannot be considered an injury," and of course, if there is no injury, there cannot be liability.

8. THE CITATION OF CASES

References to books and sources other than cases have been made in the style recommended by Campbell.[36] The legal cases however, have been cited according to the style recommended by the Alberta Law Review in

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[31]Jowitt, op. cit., p. 1675.

[32]Williams, op. cit., p. 17.

[33]Jowitt, op. cit., p. 1675.

[34]Cecil A. Wright, Cases on the Law of Torts (Toronto: Butterworth and Co. (Canada) Ltd., 1967), p. 561.

[35]Robert L. Lamb, Legal Liability of School Boards and Teachers for School Accidents (Ottawa: Canadian Teacher's Federation, 1959), p. 22.

[36]William Giles Campbell, Form and Style in Thesis Writing (Boston: Houghton Mifflin Company, 1954).

its Master Style Book.[37] A few notes regarding these citations are included here as an aid to the reader in understanding the sources.

> Unless otherwise noted by the presence of square brackets, citation is by volume number, e.g., 2 B.C.R. 201
> but [1940] 1 D.L.R.
> Square brackets are used around a date which is an essential part of the citation, and round parentheses around the name of the court and year where this is additional information to the citation. . .[38]

The "v." between the names of the parties involved in the case is read as "and" when quoting orally. Only the surname of the first party mentioned on each side is given, omitting the initials and given names.[39]

The "p" for page is omitted unless it is needed to prevent ambiguity. Instead, the first number given after the abbreviation of the journal indicates the first page of the case. Succeeding numbers would refer to pages in the case from which the information cited has been taken. Thus the citation Smith v. Jones 12 D.L.R. 10, 15 would refer to a case from the Dominion Law Reports in volume twelve, the case beginning on page 10 and the quotation referred to from page 15.[40]

Where a case has been affirmed or reversed on appeal this is indicated, e.g., (C.A.) [1901] 1 Ch. 217, aff'd (H.L.), [1903] A.C.L. or, rev'd.[41]

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[37]The Alberta Law Review, Master Style Book, mimeographed material (Second Edition, February 1962).

[38]The Alberta Law Review, Ibid., p. 1.

[39]The Alberta Law Review, Ibid., p. 6.

[40]The Alberta Law Review, Ibid., p. 7.

[41]The Alberta Law Review, Ibid., p. 8.

Some of the more frequently used Law Reports are listed below with their abbreviated version:[42]

Canadian Reports

Alta. L.R.	Alberta Law Reports
B.C.R.	British Columbia Law Reports
D.L.R.	Dominion Law Reports
Man. R.	Manitoba Reports
O.L.R.	Ontario Law Reports
O.R.	Ontario Reports, 1882-1900
[ ] O.R.	Ontario Reports, 1931-
O.W.N.	Ontario Weekly Notes, 1909-1932
[ ] O.W.N.	Ontario Weekly Notes, 1933-
O.W.R.	Ontario Weekly Reporter
Can. S.C.R.	Supreme Court Reports, Canada, to 1923
[ ] 1 S.C.R.	Supreme Court Reports, Canada, after 1923
W.W.R.	Western Weekly Reports, to 1916
[ ]	Western Weekly Reports, to 1951
W.W.R. (N.S.)	Western Weekly Reports, New Series, vols. 1-18
W.W.R.	Western Weekly Reports, New Series, after vol. 18

English Reports

[ ] 2 All E.R.	All England Reports
A.C.	Appeal Cases
[ ] K.B. or Q.B.	King's Bench or Queen's Bench
L.T.	Law Times Reports
T.L.R.	Times Law Reports, to 1950
[ ] T.L.R.	Times Law Reports, after 1950

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[42] The Alberta Law Review, Ibid., pp. 1-4.

CHAPTER II

REVIEW OF THE LITERATURE

1. The United States

During the past few years a large number of surveys concerning legal liability in physical education and education in general have been conducted in the United States and presented as Masters' and Doctoral dissertations. The current interest in this area of study may perhaps have been sparked by the work of Leibee[1] who attempted to complete an overview of the field. There seems to be a lack of research in the area of public and private recreation, however, as only one previous study was located in this area[2] and two were related to children's summer camps.[3]

Wood[4] and Fisher[5] indicate that there exists a state of confusion concerning the liability issue and that officials are often unaware of all all of the implications present.

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[1]Howard C. Leibee, Liability for Accidents in Physical Education, Athletics and Recreation. (Michigan: Ann Arbor Publishers, 1952).

[2]Joseph J. Birmingham, "Tort Liability of Municipalities in Pennsylvania for Public Work and Recreation Services" (unpublished Master's thesis, Pennsylvania State University, University Park, 1960).

[3]John J. Kirk, "An Analysis of State Laws Affecting the Operation of Children's Summer Camps. in the United States with a Suggested Universal Legislative Program"(unpublished Doctoral dissertation, The University of Michigan, Ann Arbor, 1963); William Henry Freeburg, "Law and Liability of Municipal, Charitable and Private Corporations for Conducting Recreation Camps" (unpublished Doctoral dissertation, Indiana University, Bloomington, 1949).

[4]Lewis Chapman Wood, "A Study of Tort Liability in Michigan School Districts" (unpublished Doctoral dissertation, Michigan State University 1962).

[5]Leslie Robert Fisher, "An analysis of Patterns of Liability

The primary difference between United States' litigation and that of Canada and England has been the practice of immunity from liability of the Government and its agencies in the United States. The basis for this immunity apparently stems from English Common Law and the principle of the Divine Right of Kings whereby supposedly the King could do no wrong. This principle was generalized in the United States to include the government, and it thereby became immune to tortious liability.[6] Another reason which has been given by the courts to justify this immunity is that the funds of a school district are public funds provided for the purpose of education, and therefore, they must not be diverted to other uses.[7]

A number of recent studies indicate that there is currently a trend in the United States leading away from this immunity of school districts and boards.[8] The growth trend of the immunity principle has been traced

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Decisions in the Public School of Selected States in the United States" (unpublished Doctoral dissertation, University of Oklahoma, 1963).

[6]Charles Ray Lemley, "Tort Liability of Public Schools" (unpublished Doctoral dissertation, East Texas State University, 1964); Leibee, op. cit., p. 15.

[7]Leibee, op. cit., p. 16.

[8]Robert Duane Hartman, "The Nonimmunity of School Districts to Tort Liability" (unpublished Doctoral dissertation, University of Illinois, 1963); Joseph Eugene Perrotta Jr., "An Examination of School Tort Law in Selected Atlantic and Northeastern States and the Implications for Education Therein" (unpublished Doctoral dissertation, Rutgers, 1965); David Vance Martin, "Trends in Tort Liability of School Districts as Revealed by Court Decisions" (unpublished Doctoral dissertation, Duke University, 1962); Lemley, loc. cit.; John E. Soich, "Analysis of Tort Liability of School Districts and/or its Officers, Agents, and Employees in Conducting Programs of Physical Education, Recreation, and Athletics" (unpublished Doctoral dissertation, University of Pittsburgh, 1964).

by Martin:[9]

1900 - 10 states
1920 - 16 states
1940 - 33 states
1961 - 38 states

Martin adds, however, that non-liability has been abrogated by five states and that this principle appears to be in decline. Hartman[10] indicated that California is the leader in this trend and that a number of states have now restricted the use of the immunity principle, although it still exists. Hartmann points out that the apparent philosophy underlying abrogation is that it is better for the public to assume responsibility than to place the burden on an individual.

In a general study of negligence liability in California schools, Jacobs[11] found that over one-half of the claims came from physical education and recreation and cited improper supervision as the cause. Also of interest, was that Junior High Schools had the highest share of claims per capita.

As in Canada, teachers are considered in loco parentis in their dealings with children within the scope of their responsibility.[12] This

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[9]Martin, loc. cit.

[10]Hartman, loc. cit.

[11]Allan William Jacobs, "The Administration of California Laws Holding School Districts Liable for Negligence" (unpublished Doctoral dissertation, University of California, Los Angeles, 1964).

[12]S.M.K. Alexander, "An Analysis of the Laws Affecting Public School Administrative and Teacher Personnel in Kentucky" (unpublished Doctoral dissertation, University of Indiana, 1965); Robert James Marshall, "The

means that they assume the role of the parent in matters of conduct and discipline.[13] The degree of the duty of care owed to the pupils by the teacher is expected to be greater than that which is normally required by others.[14] There is a reasonable limitation as to how great this duty is, however, for as Rosenfield[15] states:

> If school authorities were obliged to stand guard over children in the school premises at all times to protect them against the possible acts of mischief it would be fairly impossible to conduct schools without peril to the authorities who maintain and operate them.

A case involving injury as a result of another child swinging a baseball bat was dismissed with the following statement:

> . . . . children participating in such games and in fact in any sort of play may injure themselves and each other and . . . no amount of precaution or supervision on the part of parents or others will avoid such injuries . . . . The law does not make school districts insurers of the safety of the pupils at play or elsewhere, and no liability is imposed . . . in the absence of negligence on the part of the district, its officers or employees.[16]

Duties and Liabilities of Public School Teachers as Evidenced by Court Decisions" (unpublished Doctoral dissertation, University of Pittsburgh, 1963).

[13]Marshall,, loc. cit.

[14]Alexander, loc. cit.; Leibee, op. cit., p. 8.

[15]H.N. Rosenfield, "Liability for School Accidents," Nation's Schools, 31:27, April, 1943, cited by Robert L. Lamb, Legal Liability of School Boards and Teachers for School Accidents, Research Study No. 3 (Ottawa: Research Division Canadian Teachers' Federation, 1959), p.31.

[16]Underhill v. Alameda Elementary School District (1933) 133 Cal. App. 733, 24 P. (2d) 849 (in which one child was injured when he was hit by another with a bat during an informal baseball game in the school yard. It could not be shown that the supervision was inadequate nor that supervision could have prevented the accident).

In addition to the points outlined above, the following are general principles regarding teacher liability summarized from the Marshall[17] dissertation:

1. The teacher's responsibility extends from the time the pupil leaves home until he returns home.
2. The risk of liability increases if pupils are asked to perform acts outside the scope of the course of study.
3. The board is responsible for the safety of the equipment and the teacher for safe use.
4. The amount of care must be increased when the pupils are engaged in dangerous activity.
5. It is the duty of the teacher to report unsafe conditions to the authorities--failure to do so constitutes an omission.
6. The teacher increases the risk of his own liability by leaving the students unattended.

To explain the principle of causation necessary for negligence, American courts apply what is commonly called the "but for" test.[18] This means that the defendant is liable if the injury or loss would not have resulted but for his action or lack of action.

Finally, in the United States regarding recreation, it appears that whether it is governmental or not does not particularly matter. Rather, the important consideration is whether the program is of a

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[17]Marshall, loc. cit.

[18]Leibee, op. cit., p. 9.

proprietary nature or whether fees which may be charged are only to help defray expences.[19]

2. England

Probably the single most useful book available to the Canadian physical educator today is one by Barrell who states:

> Proceedings may be brought against the managers or governors, against the local education authority, or against teachers acting as their servants. Only one sum, however, may be awarded in damages. Where, in an action against a teacher, the employer is made a joint defendant, the court may find against both and, under the Law Reform Act, 1935, apportion the amount of damages to be paid by each. In general, the employer would liable for accidents arising from defective premises or equipment unless the accident is directly caused by the negligence of the servant.[20]

Three factors are necessary in order to prove negligence:

1. There must be a duty of care owed to the plaintiff by the defendant.
2. There must be a breach of that duty.
3. There must be injury or loss with a clear causal connection to the breach of the duty of care.[21]

Barrell points out, however, that there may be certain circumstances which would place a plaintiff outside the duty of care of the defendant. An example of this type of situation was cited by Leibee[22] wherein an

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[19]Leibee, op. cit., p. 30; Soich, loc. cit.

[20]G. R. Barrell, Teachers and the Law (London: Methuen & Co. Ltd., revised 1963), p. 160.

[21]Barrell, op. cit., p. 159.

[22]Leibee, op. cit., p. 8, citing Kerby v. Elk Grove Union High School District, 1 Cal. App. (2d) 246, 36 P (2d) (1934).

apparently healthy boy was struck by a basketball and died as a result of a ruptured cerebral artery. The boy had a previous defect which was unknown to the school, and consequently the court held that there was no negligence on the part of the school. It is also possible for negligence on the part of the teacher to exist, but yet he would not be held responsible for an accident if it could not have been foreseen or prevented by supervision.[23]

Special training in an area imposes upon an individual a higher duty of care to others in that area, and thus a teacher is expected to know more of the peculiarities of children than the average individual.[24]

An employer is responsible only for those acts which an employee does within the scope of his employment. Questions regarding the legality of using pupils for various duties which are for the benefit of the staff may arise. Lord Justice Farwell[25] states:

> In my opinion the Education Acts are designed to provide for education in its truest and widest sense. Such education includes the inculcation of habits of order, obedience and courtesy; such habits are taught by giving orders and, if such orders are reasonable and proper under the circumstances of the case, they are within the scope of the teacher's authority and though they are not confined to

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[23] Gow v. Glasgow Education Authority [1922] S.C. 260 (wherein a blind child was playing with a group of children, some of whom were not blind, when another child jumped on his back knocking him down and injuring him. It was held that supervision could not have prevented the accident); Underhill v. Alameda Elementary School District, op. cit., p. 22.

[24] Barrell, op. cit., p. 163.

[25] Smith v. Martin and Kingston-Upon-Hull Corporation [1911] 2 K.B. 775, 784. (A teacher sent a 14 year old girl to poke the fire and draw the damper in the teacher's common room. The girl's dress caught fire and she was burned).

> bidding the child to read or write, to sit down or to stand up in school, or the like. It would be extravagant to say that a teacher has no business to ask a child to perform small acts of courtesy for herself or for others, such as to fetch her pocket handkerchief from upstairs, to open a door for a visitor, or the like: It is said that these are for the teacher's own benefit, but I do not agree. Not only is it good for the child to be taught to be unselfish and obliging, but the opportunity of running upstairs may often avoid punishment. The wise teacher who sees a child becoming fidgety may well make the excuse of an errand for herself an outlet for the child. Teachers must use their common sense, and it would be disastrous to hold that they can do nothing but teach.

The age of the plaintiff can have a great effect on a case. Negligence in one case might very well not be in another one where all of the circumstances are the same with this exception. Percy[26] questions: "Is the thing one of a class which children of that age are, in the ordinary course of things, not allowed without supervision?"

It is of benefit to the teacher in charges of negligence if he can prove that he had given warning of the danger involved in a particular act. The provision of signs to this effect is not adequate but would weigh in favor of the teacher.

Discussing accidents away from the school, Barrell[27] briefly outlines his findings in a number of possible circumstances. The teacher is not liable for accidents between school and home. Regarding visits to the doctor or the like, there is no liability if the visit is on the way to school; but if the student is sent from the school, there should be an

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[26]R.A. Percy, Charlesworth on Negligence (fourth edition; London Sweet and Maxwell, 1962) cited by Barrell, op. cit., p. 168.

[27]Barrell, op. cit., p. 174.

escort. A teacher who sends a child on a personal errand away from the school premises is acting outside the scope of his authority and would, therefore, be personally liable. On educational visits or to games, the teacher is in loco parentis and remains so whether within school hours or not. Likewise, on school journeys, the teacher is in loco parentis throughout for twenty-four hours each day.

Barrell[28] points out that letters of indemnity have no legal authority, but nevertheless recommends their use as the fact of having drawn the parents' attention to a particular venture will weigh in favor of the teacher.

Finally, regarding the use of private cars for transportation, he notes that some boards may permit their use in certain circumstances while others flatly prohibit any use.[29] In the latter instance a teacher would be acting outside the scope of his authority by using a private vehicle and would, therefore, be liable. He suggests that the teacher ask himself whether a particular use is essential to the fulfilment of professional responsibility and states that he should be aware of the terms of his own private insurance policy.

3. Canada

Lamb covered in general terms the basis of liability resulting from negligence and the essential factors necessary for successful action

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[28]Barrell, op. cit., p. 210.

[29]Barrell, op. cit., p. 241.

on this charge,[30] as well as various aspects of school board liability including claims against unsafe property and equipment.

> If it can be shown that the accident was the direct result of misrepair or neglect of school property and equipment, the board may be guilty of negligence.[31]

This is discussed in a decision of the English courts:

> If they (children) are injured by neglect of a statutory duty with respect to a place where they are expected to play, they are entitled to make those upon whom the statute has imposed the duty, responsible for injuries sustained by them through breach of duty.[32]

Regarding the problem of supervision Lamb states that:

> The distinction in supervision seems to be that teachers and boards will probably be held liable for providing poor supervision, but may or may not be held liable for providing no supervision--non-feasance--depending on the facts in the case.[33]

This principle falls under what is known as occupier's liability which means that the occupier of property has the power to refuse admittance to the property, but if he permits entry he accepts responsibility to see that no harm is done to others on his property as a result of his negligence.[34] There is a varying standard of care owed to those who enter the property, dependent upon how they would be classified by law.

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[30]Robert L. Lamb, Legal Liability of School Boards and Teachers for School Accidents (Research Study #3; Ottawa: Canadian Teacher's Federation, 1959).

[31]Lamb. ibid., p. 16.

[32]Ching v. Surrey County Council [1909] 2 K.B. 762, approved [1910] 1 K.B. 736, 743 (in which a 9 year old boy tripped when his foot caught in a hole in the paving on the school ground. The existence of the hole had been known by the authorities for six months. It was a statutory duty of the defendants to keep the premises in a state of repair and they were found liable).

[33]Lamb, ibid., p. 17.

[34]Lamb, ibid., p. 20.

This standard is highest for invitees, less or licensees, and least for trespassers. School children are considered invitees because they are required to attend. Users of parks and playgrounds on the other hand are licensees, and as such they would not command as high a standard of care.

One defense which is used in negligence cases is volenti non fit injuria which "means that that to which a man consents cannot be considered an injury."[35] In using this principle as a defense, the defendant must be able to prove that the plaintiff was aware of and willing to undergo the risk involved; and even then he may be awarded damages. An example of the application of volenti would be an injury resulting from the normal course of a hockey game. Lamb cites a case in England however, where volenti did not apply because the boy was ordered to play.[36]

Another defense that a defendant might use is to prove that the plaintiff did not conduct himself as a reasonable man and thereby eliminate or reduce damages. Where the plaintiff and defendant are both found negligent, the damages are likely to be shared.

Unlike the United States, school boards in Canada and England are not considered to be part of the government and, therefore, do not receive

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[35]Lamb, ibid., p. 22.

[36]Jones v. London County Council (1931) 172 L.T. Journ. 485, (1932) 30 L.G.R. 371, (C.A.). (It should be noted that Lamb's interpretation of this case was either incomplete or incorrect as the original decision was reversed. See s. 28 in Chapter 4, p. 51).

immunity for their liable actions.[37] Most provinces do have some provision for a time limit after which no legal action may be raised. This limit varies from three months to one year.[38]

A defense which has been used successfully involves the delegation of authority. The principle involved appears to be that in an instance where the school board has engaged a competent professional, such as a doctor, and that individual is negligent in the conduct of his duty, he shall personally be liable for his actions.[39] This principle does not apply to such persons as janitors or charwomen.

Three facts must be established in order to present a successful case against a school board for the negligence of its teachers:

1. that the relationship of master and servant existed.
2. that the action by the servant was within the scope of his employment.
3. that there was the absence of the degree of care which would be exercised by a "careful father."[40]

The obvious defense against this kind of action is to disprove any one

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[37]Lamb, op. cit., p. 37.

[38]Lamb, op. cit., p. 40. (It should be noted again that this information is incorrect. See infra s. 13, p. 34).

[39]Lamb, op. cit., p. 46.

[40]Shepherd v. Essex County Council (1912-13) 29 T.L.R. 303 (in which a 15 year old boy was severely burned as a result of putting a piece of phosphorus in his pocket. Phosphorus burns at 95°F. The class had been previously warned twice about the danger of phosphorus. It was held that there was no negligence on the part of the teacher).

of these three factors.

4. Summary

This then briefly constitutes a summary of literature of the United States, Britain and Canada which is relevant to the current study of tortious liability of Canadian Physical Education teachers and recreation practitioners. The key principles raised which are relevant to the Canadian scene would seem to be:

1. There is no principle of immunity from tortious liability of school boards or districts in Canada.
2. The Canadian teacher is not personally liable for his negligence as long as he is acting within the scope of his authority.
3. Teachers and school boards are only responsible for the safety of pupils within the school grounds or those on authorized school activities outside of the school grounds.
4. Contributory negligences may be used as a defense by the defendant, and these may thereby reduce or eliminate his amount of liability.
5. First aid should be administered to accident victims by competent persons only and in a very cautious manner.
6. Letters of indemnity cannot absolve the teacher or his school board of responsibility for ventures away from the school premises, but they do weigh in favor of the teacher in event of a legal action.
7. The teacher is considered to owe his students the duty of

care of a "careful father."

8. The school board is responsible for the safe condition of the facilities and equipment and the teacher is responsible for safe use; however, the teacher is also responsible for reporting any defects or unsafe areas.[41]

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[41]Lamb, op. cit., pp. 56-60.

CHAPTER III

THE LAW OF TORTS

1. INTRODUCTION

Legal writers have quarrelled for years about whether it is more correct to refer to the "law of tort"[1] or the "law of torts."[2] The arguments used to support each claim are highly ethereal and most definitely outside the scope of this project. Therefore the terms will be employed synonymously in this paper. The field of tort law deals with all matters concerning the rights of individuals which do not involve contract or criminal law, or as Prosser[3] has stated it is:

> . . . a body of law which is directed toward the compensation of individuals, rather than the public, for losses which they have suffered in respect of all their legally recognized interests, rather than one interest only, where the law considers that compensation is required. This is the law of torts.

This covers a wide range of topics and, as indicated in the previous chapter,[4] it is not the intent of this study to investigate all aspects of the law of torts. Rather, negligence and all of its pertinent ramifications will be reviewed and discussed, as well as relevant portions

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[1]Sir P. Winfield, Law of Tort (fifth edition; London: Sweet & Maxwell, Limited, 1950), p. 7.

[2]Sir John Salmond, Law of Torts (sixth edition; London: Sweet & Maxwell, Limited, 1924) p. 8.

[3]William L. Prosser, Handbook of the Law of Torts (third edition; St. Paul: West Publishing Co., 1964), p. 6.

[4]Supra, p. 15.

of the law which are generally considered under the heading of "strict liability."[5]

"Tort liability . . . exists mainly to compensate the person injured by compelling the wrongdoer to pay for the damage he has done. Its function is to shift the loss from the victim to the person who inflicted it on him."[6] All torts involve the breach of some duty.[7] In attempting to fix the onus of liability for negligence, it is necessary that the plaintiff be able to prove within reason that the following three factors existed:

1. There must have been a duty of care owed to the plaintiff by the defendant,
2. There must have been a breach of that duty of care, and
3. There must have been some injury or loss with a clear causal connection to the breach of the duty of care.[8]

In planning the defence against an action for negligence counsel for the defendant will carefully examine the facts of the case in the light of each of these three requirements of negligence. Assuming that he can show to the satisfaction of the court that one or more of these

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[5]John G. Fleming, The Law of Torts, (second edition; Sydney: The Law Book Co. of Australasia Pty Ltd., 1961), p. 15.

[6]Ibid., p. 2.

[7]W.F. Frank, The General Principles of English Law, (London: George G. Harrap & Co. Ltd., 1957), p. 149.

[8]G.R. Barrell, Teachers and the Law, (London: Methuen & Co. Ltd., revised 1963), p. 161; Frank, op. cit., p. 153.

three factors does not exist in the situation, there can be no negligence.

2. TAKING A CASE TO COURT

The procedure involved in taking a case to court for settlement can be very intricate and tedious. The outline which follows does not deal with any of the tangential details which may arise, but covers only the essential points which must be followed.

Statement of Claim. At the initial meeting of the plaintiff with his counsel, if it is decided that they have grounds for a case, a statement of claim is drafted and sent to either the defendant himself or his solicitor if he has one at the time. This statement of claim is issued from either the local district court or from a higher court depending upon whether the plaintiff feels that the settlement is likely to be small or high.[9] In the statement, the plaintiff will name the defendant or defendants,[10] state what the action is for, and enumerate the points upon which he is basing his action. Appended to this statement of claim must be a report as to the extent of the injuries involved, as well as any special damages to be claimed.[11]

Appearance. Upon receipt of the statement of claim, the defendant has eight days[12] within which he must make an appearance at

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[9]A.K.R. Kiralfy, The English Legal System (third edition; London: Sweet & Maxwell Limited, 1960), p. 258.

[10]Ibid., p. 256.

[11]Ibid., p. 270.

[12]Ibid., p. 260.

the courthouse from which the claim was issued if he intends to defend himself in court. A point which arises here is that the defendant's solicitor will immediately examine the date of the occurrence of the tort claimed to ensure that the action has been commenced within the required period of time as established by law, which in this case would be within two years after the cause of action arose.[13] If the procedure has not been initiated within this prescribed limitation, the lawyer for the defendant can have the action quashed immediately. Most actions end at this point[14] as the defendant does not make an appearance and the plaintiff is awarded a judgement in default. In the event that the plaintiff has claimed damages which must be assessed, this is done by the court in much the same manner as an ordinary trial.[15] Assuming an appearance is made, it is then necessary for the defendant's solicitor to deliver his defence[16] following which the pleadings[17] may then transpire.

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[13]Limitation of Actions Act, S.A. 1966, c. 49, s. 51; R.S.B.C. 1960, c. 370, s. 3 (4 years); S.M. 1966-67, c. 32, s. 3 (d); R.S.N.B. 1952, c. 133, s. 4; R.S.Nfld. 1952, c. 146, s. 2 (4 years); R.S.O. 1960, c. 214, s. 48 (j) (4 years); R.S.P.E.I. 1951, c. 87, s. 2 (d); R.S.S. 1965, c. 84, s. 3 (d); R. Ord.N.W.T. 1956, c. 59, s. 3 (d); R.Ord.Y. 1958, c. 66, s. 3 (d); R.S.N.S. 1967, c. 168, s. 2 (6 years). (All are 2 year periods unless otherwise indicated).

[14]Kiralfy, op. cit., p. 265.

[15]Ibid., p. 266.

[16]Ibid., p. 267, and infra, p. 35.

[17]Ibid., p. 268, and infra, p. 36.

Defence. This must be made within a period of fourteen days[18] otherwise the plaintiff can proceed to a judgement in default in similar manner to what he would have done had no appearance been made. In his statement of defence, the defendant is permitted to plead alternative defences, so that he might say that he was not present at the time of the accident and that if he was, he was not responsible for the behavior of the group or individuals involved.[19] The defendant might also flatly deny the facts of the statement of claim which would then place the burden of proof on the plaintiff. Alternatively he might admit the facts claimed but plead new facts which present the case "in a different light."[20] Any facts which are not denied are considered to be admitted by the defendant,[21] so it is imperative that this statement be carefully constructed. Following the filing of this statement of defence there may be "discovery by affadavits" and then pleadings.

Discovery. When one of the parties knows of documents or other evidence which are in existence and would be useful to him in preparing his case, he may procure the privilege of inspecting them or obtaining a copy through this process which involves an interchange of registered documents between the solicitors.[22]

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[18] Ibid., p. 267.

[19] Ibid., p. 27.

[20] Ibid., p. 271.

[21] Ibid.

[22] Ibid., p. 276.

Pleadings. The pleadings are a further exchange of affadavits between solicitors which serve to more precisely define the facts to be contested in court. Thus, if the defendant in his defence was to raise issues which had not been previously mentioned by the plaintiff, it would then be necessary for the plaintiff to deliver a reply, which might in turn have to be answered. Through this process which could involve an extended period of time, all of the issues which are not to be contested are eliminated, thus limiting the length of the trial. Only those issues of fact which are raised in this manner will be heard at the trial.[23]

Counterclaim. In his statement of defence the defendant might open a separate cross-action against the plaintiff for his alleged tortious behaviour. The plaintiff would then have to reply to this with his defence and raise any new facts needed to counter this claim. Failure to reply on the part of the plaintiff would be construed as an admission of the facts claimed. Thus, a teacher who was being sued by a student for injuries received in a fall, might in turn lay claim against the student for injuries which he had sustained in trying to break the student's fall, if he felt that it was the negligent behaviour of the student which had been the cause of the fall.[24]

Termination of Action. The action may be terminated at any point in the above procedure, or even during the trial. The defendant may

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[23] Ibid., p. 269.

[24] Ibid., p. 274.

withdraw his defence and the plaintiff would then proceed to judgment in default. The plaintiff could also choose to discontinue his action after examining the statement of defence. Alternatively, the two parties might also come to a settlement of their differences out of court at any point in the process up to the point of a final judgment by the court. Formal litigation is always discouraged if it can be avoided, and consequently the court simply requests prompt notification of a settlement.[25]

Assessment of Damages. The amount and extent of damages must be claimed and proven as part of the trial proceedings, permitting the defendant an opportunity to refute all or part of the claim. The court will then attempt to arrive at a fair assessment of the damage which can be reasonably attributable to the tortious action for which the defendant has been found responsible.[26]

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[25] Ibid., p. 281.

[26] Ibid., p. 294.

CHAPTER IV

NEGLIGENCE: STANDARD OF CONDUCT

Negligence,[1] briefly, is the omission or commission of the performance of some act which could be foreseen to result in injury to some individual. It is important that this act could have been reasonably foreseeable and to have a direct causal connection to the resultant injury.

1. Unavoidable Accident

A defendant who chooses to plead that the injury sustained was the result of some accident which could not have been avoided carries the onus of proof of such a claim.[2] This defendant has two possible courses of action in the presentation of his defence; either he must show that something other than his own act was the cause of injury,[3] or he must detail all of the possible causes, showing that at least one of these reasons "is consistent with the absence of negligence."[4] In the event that the

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[1] See negligence, supra, p. 11.

[2] Down v. Schmitz (1952-53) 7 W.W.R. (NS) 325, (automobile accident case which referred to The "Merchant Prince" [1892] 67 LT 251, 179, 189).

[3] Down v. Schmitz, ibid.; Steves v. Kinnie [1917] 1 W.W.R. 1250, 24 B.C.R. 130, 33 D.L.R. 776, (marine accident).

[4] Northern Construction Co. v. Merchants Cartage Co. Ltd., (1958) 14 D.L.R. (2d) 438, 444, (trucking accident where some concrete beams were destroyed through failure to provide adequate lashings and to drive the truck over suitable terrain).

plaintiff is able to show what the actual cause of damage is, it then becomes necessary for the defendant to show all other possible causes, "and must further show with regard to every one of these possible causes that the result could not have been avoided."[5] Thus the defendant is attempting to prove that what occurred was something over which he had no control and could have done nothing to prevent regardless of the amount of skill and care which he might have exercised.[6] Assuming that the defendant is able to so prove, there can be no action.[7]

The basis of decision of Rintoul v. X-Ray brings forth some important considerations for physical education. In particular, the defendant was unable to show that there had been an adequate inspection of the vehicle, or that the mechanical failure was inevitable, or that the accident was inevitable even after the alleged mechanical failure of the brakes to operate. These facts emphasize the need for regular daily or weekly inspection of all apparatus, equipment, and facilities, and the maintenance of records of these tours of inspection.

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[5]Northern Construction Co. v. Merchants Cartage Co. Ltd., ibid.

[6]Rintoul v. X-Ray and Radium Industries Ltd., [1956] S.C.R. 674, (a truck crashed into the rear of the plaintiff's stationary vehicle. The truck had just previously stopped at a traffic light where the brakes had functioned properly, but then failed to operate to prevent the accident. The defendant could not show that the malfunctioning of the brakes could not have been detected by adequate inspection, nor that the accident could not have been avoided through the exercise of reasonable care).

[7]Turnbull v. Graham [1918] 3 W.W.R. 1033, 14 Alta.L.R. 125, 44 D.L.R. 632, (an automobile-pedestrian accident in which the defendant's car was knocked out of control by another vehicle who failed to yield right of way); Parkinson v. Dolsen (1910) 16 W.L.R. 383, (collision of two horse and carriage rigs after the defendant's horse had been scared

2. Elements of Cause of Action

Action for negligence can only be successful with the existence of the following three elements: there must have been a duty of care owed the plaintiff by the defendant; there must have been a breach of that duty; and there must have been some loss or damage resulting from that breach of duty.[8] Although damage or injury may have been sustained, it may not be possible to recover damages as the injury must be attributable to the negligence of someone who owed a duty of care to protect the injured party[9] and the person owing the duty must be the defendant.[10]

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by another rig passing in an unruly manner); Neil v. Day (1911) 19 W.L.R. 227, (collision of two rafts in a river. There was not sufficient evidence to show that the defendant had negligently handled the raft).

[8]Magda v. The Queen [1953] 2 D.L.R. 49, (where a foreign seaman claimed he had been illegally detained); Roe v. McLeod (Silver Glade Roller Bowl) [1946] 3 W.W.R. 522, [1947] 1 D.L.R. 135, reversed [1947] S.C.R. 420, [1947] 3 D.L.R. 241, (the defendant company supplied roller skates for the plaintiff and an employee fastened them. No toe straps were used in the fastening, though they could be rented and a sign indicated that they were available. The skate came off after an hour and an injury resulted. The defendant showed that the skate had been properly fastened and that the skates were regularly inspected. He further showed that it was common and approved practice in Canada and the United States to use skates without the additional toe strap).

[9]Hancock v. Gillespie (1956-57) 20 W.W.R. 657, (1957) 7 D.L.R. (2d) 632, (in this case a lady slipped on an icy street while getting into a bus. The street had been sanded and the courts thus found no negligence).

[10]Australian Newsprint Mills Limited v. Canadian Union Line Ltd., (1953) 9 W.W.R. (NS) 13, [1953] 2 D.L.R. 828 affirmed [1954] S.C.R. 307, [1954] 3 D.L.R. 561, (failure on the part of a third party drydock company to properly complete repairs resulted in damage to the cargo. It was held that the drydock company owed a duty of care to inspect its work rather than the ship owner or its employees).

The duty of care owed a servant or employee by his master includes providing a safe place in which the servant is to work. This duty exists even though the servant may be providing gratuitous service, and this latter point is of particular importance to the physical educator who often donates his professional talents on an occassional or regular basis. It is also common practice in recreation to enlist the aid of volunteers to assist with various aspects of program or development of facilities. In each of these instances the relationship of master and servant exists and a high duty of care is imposed.[11]

Also of interest to the physical educator is the fact that the duty of care exists even though an individual is a wrongdoer.[12] Thus, having cautioned a person against doing a particular thing does not necessarily absolve the practitioner from providing for the safety of that individual. For instance, warning a person against using a trampoline without spotters but then leaving it possible for his unauthorized use, might still leave one liable.

Another point of law which is often erroneously interpreted by

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[11] Huba v. Schulze and Shaw (1962) 37 W.R.R. 241, (1962) 32 D.L.R. (2d) 171, (in which the plaintiff was assisting gratuitously in the moving of some furniture when the improperly secured heavy tailgate of a truck fell and injured him. The man whom he was helping was considered to be his master, and the other man who was also helping, his neighbour as in Donoghue v. Stevenson [1932] A.C. 562, 101 L.J.P.C. 119).

[12] Wallace Foundry Co. v. Dominion Shingle and Cedar Co. (1920) 28 B.C.R. 147, (where one man tied a boom of logs to another's wharf without permission and the wharf was subsequently damaged. The fact that the wharf was illegally constructed in open water was no defence against the negligent act).

the layman centers on the use of waiver forms and clauses. The practice of employing these forms is somewhat questionable as:

> A clause in a contract which provides that one of the parties thereto shall not be liable to the other for damages caused him in the carrying out of the contract does not free the former from liability for negligence unless the clause clearly says that it does or unless it can have no operation except as applied to such a case.[13]

In this respect it might be construed that a waiver clause in implying a high degree of risk serves to interject at the same time, a higher standard of care than might otherwise have been required. It might also be argued that the waiver clause infers such a high degree of risk that in fact, the entire venture should not have been undertaken in the first place.

3. Unreasonable Risk

Almost every daily human action carries with it some risk of loss or harm. The probability of injury or damage occurring as a result of a particular action is generally such that the actor is aware of it before initiating the action. This awareness makes it possible for him to take due care to prevent any damage from occurring.[14] However, in

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[13] Canada Steam Ship Lines Ltd. v. Regina (1952) 5 W.W.R. (N.S.) 609, [1952] 1 T.L.R. 261, [1952] 2 D.L.R. 786 reversing [1950] S.C.R. 5 532, 4 D.L.R. 703, (where a shed leased by the plaintiff from the defendant, burned down through the negligent actions of the defendant's servants. A clause in the contract against bringing action against the defendant for damge to goods in the shed could not free the defendant from liability for negligence unless it had clearly so stated).

[14] Porter (J.P.) Co. v. Bell [1955] 1 D.L.R. 62, (where vibrations from a blasting operation caused damage to property situated some distance away. The defendant failed to show that the operations could not have been accomplished by other means and was therefore liable); Brown v. Walton and Berkenshaw and Brown [1943] 1 W.W.R. 717, [1943]

some instances the risk of injury or damage may be so great that it is totally unreasonable for the actor to consider carrying out the intended action. In the event that he does pursue it and some damage or injury occurs he would unquestionably be negligent, possibly to the point of being accused of intent.[15] In addition to this, if the actor continues an action in which some known risk is present and he fails to guard against it, he is then negligent in so doing.[16] The amount of damage which is risked is also of importance as failure to guard against a risk of a small amount of damage might not be considered as negligent, whereas the same lack of care where the possible damage was high could be considered highly negligent. As Terry states:

> It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of

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2 D.L.R. 437, (a collision involving four vehicles. Walton's truck was left standing at the roadside while he went for a tire to replace a flat one. The truck was not marked by any warning lights or even tail lights. The plaintiff's car slid and struck the truck. Berkenshaw subsequently struck plaintiff's car, and defendant Brown then struck Berkenshaw's car causing further damage to plaintiff's car. Walton was held negligent in the first instance because of the negligent manner in which he left his truck. Defendant Brown was liable subsequently for failing to drive with due care and caution as it was considered that he could have avoided the collision. O'Halloran, J.A. stated that "the doctrine that the test of liability in negligence cases is the responsibility arising from the anticipation of harm or risk of harm, because that risk, and not proximity in point of space of time or the number of intervening events, is regarded as the true spring-board of causation").

[15]William L. Prosser, Handbook of the Law of Torts (third edition; St. Paul: West Publishing Co., 1964), p. 149.

[16]Ibid., pp. 148-150.

> the interest which the actor is seeking to protect, and the expedience of the course pursued.[17]

An essential point which should be clearly understood is that it is not sufficient that the people can now see that the risk involved in the action was great, but that it was possible for a person in the place of the actor at the time of the action to have seen that the risk was great.[18]

4. The Reasonable Man.

Fair assessment of the acceptability of a particular act necessitates the use of some standard, in light of which the act may be judged. The nebulous standard which has evolved for use in the courts is that of the "reasonable man." This mythical person has been the subject of much controversy, as some of the traits attributed to him can be construed out of all reasonable proportion.[19] In the application of the standard of the reasonable man, care is taken to compare his actions under the same circumstances as faced the actor in question.[20] Considered as part of the circumstances are the physical attributes of the actor himself, which includes his age, sex, mental capacities and

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[17]Henry T. Terry, Negligence, 1915, 29 Harv. L. Rev. 40, 42.

[18]Ibid., p. 149.

[19]Supra, p. 13.

[20]Carnat v. Matthews [1921] 2 W.W.R. 218, 16 Alta. L.R. 275, 59 D.L.R. 505, (wherein a car struck a bicyclist during a gentle rain. There was no evidence to show that the driver of the car could not have avoided the accident through the exercise of due care).

possible physical disabilities. Thus in an instance when a blind man is charged with negligence, his conduct is compared to that which would be expected of the ordinary reasonable man who is blind.[21]

On the other hand, one who is inferior or mentally deficient receives no special consideration for his handicap.[22] The apparent reasoning for this is that the damage or injury inflicted on others is still as great and perhaps may be greater than if he were highly intelligent, and said individual must learn to live within the rules of the society in which he exists.[23] An associated but somewhat less well

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[21]Jones v. Bayley, 1943, 49 Cal. App. (2d) 647, 122P. Rep. (2d) 293, (where a man who was extremely nearsighted was struck by a car. It was held that he did not exercise due care in crossing the street. Dooling, J. said ". . . negligence is failure to use ordinary care and that ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. A person with faculties impaired is held to the same degree of care and no higher. He is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances. . . . This may require a more alert use of his other faculties to reach the standard of ordinary care . . .").

[22]Glasgow Corporation v. Taylor, [1922] 1 A.C. 44, 67 (where a seven year old boy died as a result of eating some poisonous berries from a shrub in a public botanical garden. It was held that the shrub constituted a trap, that the corporation was aware of its existence, and that they failed to provide warning or reduce the danger. Regarding the age of the boy Lord Sumner said ". . . infancy as such is no more a status conferring right, or a root of title imposing obligations on others to respect it, than infirmity or imbecility; but measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know or ought to anticipate the presence of such persons within the scope and hazard of their own operations."); C.P.R. v. Anderson [1936] 3 D.L.R.145 (the railway company was not liable when a small boy fell from a freight car when it began to move. The train was properly shunting cars and the boy was a trespasser. The company owed him no duty other than to abstain from wanton or wilful injury).

[23]Prosser, op. cit., p. 156.

defined area is that dealing specifically with children. Here it appears that the only statement which can be made is that they are to be treated in the same way as "children of like age, intelligence and experience,"[24] but with exceptions.[25]

The amount of knowledge which a person brings to a situation must also conform to some minimal standard. This knowledge must be the amount which an average man would be expected to have acquired by adulthood even though the particular situation is strange to the actor.[26] However, in the event that the person professes to have some superior skill or knowledge, as is the case of the recreation and physical education practitioner, his behavior must be evaluated on the basis of "the minimum common skill"[27] which is expected of a member of the profession in good standing. An interesting question in this regard is "how low is the acceptable standard in the professions of physical education and recreation when their major professional body requires only the payment of a nominal fee for membership?"

5. Application of the Standard

When there exists no official statement or ruling as to the acceptability of a particular practice, it is usual to indicate what

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[24] Ibid., p. 157.

[25] Ibid., p. 159.

[26] Ibid., p. 162.

[27] Ibid., p. 165.

appears to be the "common and approved practice" in that regard. In some instances the term "approved" may in reality only mean that it has never been officially disapproved. The practice of doing what others are doing could conceivably lead a practitioner into negligent action,[28] for "what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence,

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[28] Wright v. Cheshire County Council [1952] 2 All E.R. 789, 116 J.P. 555, 2 T.L.R. 641, 96 Sol. Jor. 747, 51 L.G.R. (where a 12 year old boy fell while vaulting a buck. There were four stations in progress at the time and the master was dealing with another squad. The bell rang and the spotter immediately left without being dismissed just as the boy was vaulting. It was held that "supervision was in accordance with normal practice, had been safely practiced for years, and that it was not negligent"); Gibbs v. Barking Corporation [1936] 1 All E.R. 115 (here a boy fell while vaulting a horse when there had been no precautions against a fall. It was held that the master was negligent); Chilvers v. London County Council (1916) 80 J.P. 246 (where some children were playing with toy soldiers when one boy fell on the lance of one of the soldiers which pierced his eye. It was held that the act of playing with this sort of toy is a common occurrence and that is could therefore not be considered negligent to allow them to do so in school); Jones v. London County Council (1931) 172 L.T.Jor. 485, reversed (1932) 30 L.G.R. 371, (where a boy was ordered to play "horses and riders." He fell with his rider on top of him, injuring his right arm resulting in permanent paralysis. Volenti non fit injuria was held not to apply because the boy was ordered to play, and the master was found negligent. On appeal this decision was reversed and Lord Justice Scrutton observed that it would be difficult to claim negligence for a game which had been played for 20 years, and noted further that few physical exercises could be done without the possibility of an accident); another case reported in the School Government Chronicle, February 19, 1925 involved injury to a 7 year old girl who was running and jumping over a series of inverted waste baskets. This practice was used as a lead-up activity to hurdling and had been employed at the school for 2 1/2 years with no mishap. It was held that there was no negligence); Brost v. Tilley School District (1955) 15 W.W.R. 241, (a 6 year old girl was being given a ride on a swing by another girl who was standing up. The plaintiff was scared and asked her to stop but she didn't. The plaintiff in her panic let go and fell. It was held that a supervisor would have required that the girl stop and thus the accident would have been avoided. There was no specific system of supervision, though a teacher had been on the playground at the time. The board and principal were negligent but not the teacher).

whether it usually is complied with or not.[29] This caution should be taken seriously by all in the field.

A sudden crisis may possibly affect the judgment of the individual causing him to make decisions contrary to what he would do in a more normal situation. This crisis must then be considered as part of the circumstances in which the action took place and thus:

> The test of the defences of inevitable accident . . . is not whether a better course was in fact open to the defendant but whether what he did was what an ordinary prudent man would have done in such an emergency.[30]

Although the specific emergency situation cannot be anticipated, generalities can be. Therefore, it is essential that a general procedure to be followed should be worked out in advance, mentally rehearsed, and reviewed periodically in order that when an emergency does arise a minimum amount of decision-making is necessary, thereby reducing the probability of an unreasonable decision.[31] This shield of the emergency situation cannot be applied however, where the situation has been brought about through the negligence of the actor himself.[32] In this instance it is the negligent act prior to the emergency which is inexcusable, rather than the resultant actions. One exception to this is

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[29]Texas and Pacific Ry. Co. v. Behymer, 1903 189 U.S. 468, 23 S. Ct. 622, 47L. Ed. 905, (where a brakeman was injured when he fell from the top of a slippery freight car when a shunting train stopped suddenly. Normally this type of a stop would have been approved practice, but in the circumstances, with the freight cars knowingly icy, it was negligent, as it was not essential).

[30]Down v. Schmitz, supra s.[2]. p. 41.

[31]Prosser, op. cit., p. 172.

[32]Spratt v. City of Edmonton [1942] 2 W.W.R. 456, (a bus pulled

that if the negligent act which initiated the situation had been the only one possible, its commission may be deemed acceptable as the "last clear chance."[33]

Individuals are also required to exercise a reasonable amount of foresight in regard to the possible conduct of others.[34] This particularly applies in regard to the presence of children in the vicinity,[35] and where the actor is one who professes to have some superior knowledge of the behavior of children, it would reasonably be expected that he would exercise a greater amount of care than the ordinary individual. Thus for example, the teacher who structures a group situation in such a way that it imposes a high degree of group pressure upon an individual, and in particular a child, can reasonably anticipate that the individual may act in an unreasonable manner. The possible behavior of the child in this type of situation should be anticipated by the teacher, and therefore the use of this technique

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away from the curb without the driver having properly checked the traffic. He suddenly had to stop to avoid a car which was passing, and as a result a passenger fell and was injured. The driver was found negligent for not having checked the traffic properly before starting away from the curb. ". . . conduct which obviously constitutes negligence is excusable if adopted under the spur of a sudden emergency, yet a person whose negligence brought about or contributed to the creation of the emergency cannot escape liability by invoking this rule"); Oakshott v. Powell (1913) 24 W.L.R. 654, 6 Alta.L.R. 178, (the defendant was passing a street car on the right hand side. Two children darted into the street and the defendant turned his auto toward the street car to avoid the children, subsequently striking the plaintiff who was mounting the street car. The defendant was still liable as it was his own negligent act which brought about the emergency situation).

[33]Prosser, op. cit., p. 173.

[34]Ibid.

[35]Ibid., p. 174.

might in some instances be considered negligent.

Physical educators and recreation practitioners must be extremely careful in their dealings with a third party in situations which have a high potential for injury. For example, responsibility for injury sustained directly as a result of faulty protective equipment purchased from an unfamiliar dealer might be assigned to the practitioner for his negligence in not having inspected the equipment, or for having dealt with a firm of unknown reputation. Furthermore, in situations where the risk is unreasonably great it may be unacceptable to rely upon the responsibility of another person to whom it has been assigned. Examples of this might be in the construction, installation or inspection of potentially dangerous areas[36] and pieces of equipment[37] such as climbing ropes,[38] rings, underwater lighting

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[36] Novak v. Ford City Borough 292 P 537, 540, 541 (1928), (in which a high voltage wire sagged over a mound in a public park where children played. An 8 year old boy grabbed it and was permanently injured. "Public places, where children are accustomed to play, should be safeguarded against that which is likely to cause them harm").

[37] Edmondson v. Moose Jaw School District [1920] 3 W.W.R. 979, 13 Sask.L.R. 516, 55 D.L.R. 563, (where an 8 year old boy was struck in the eye by the cross bar at the high jump pit by which he was standing. The bar was bamboo and had a jagged end as it had been broken. On appeal it was held that the pole did not constitute a trap to anyone using it, and that it did not constitute any unusual danger).

[38] An uncontested case in Edmonton was the result of a bolt, which supported a climbing rope, breaking while a student was ascending. When he landed both heels were broken. The teacher had checked the rope before class, and the mats were adequate and in place. He could not have been expected to discover the defect which caused the accident and thus the case was dropped before reaching the courts. It may have had some chance of success, had the plaintiff pressed action against the maintenance department of the board instead of the teacher.

fixtures,[39] flagpoles,[40] playing surfaces,[41] or any other construction project on the grounds.[42]

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[39]Edmonton Journal January 17, 1968, Toronto Globe and Mail February 15, 1968 (reported the drowning of a 15 year old boy when a current from a faulty underwater light stunned the swimmer. In this unreported case, the court ruled that the school board was negligent in the maintenance and supervision of the pool).

[40]Booth v. St. Catherines [1946] O.R. 628 reversed [1947] O.W.N. 165 and restored [1948] S.C.R. 564 (where some boys climbed a flagpole in a public park to see a fireworks display. The pole collapsed and several people were injured. The defendant was found liable on the ground that, even if the boys were trespassers, their acts were those of persons in a state of excusable ignorance and not fully responsible for their actions, and further that their lack of responsibility should have been foreseen by the defendant); compared with Jameson v. Philadelphia 282 P 207, 210 (1925), 127 A 629. (In this case a flagpole was being raised by some local citizens when a guy rope broke and the pole struck and killed the plaintiff's husband. The erection of the pole had been authorized by the park superintendent but none of his staff were involved in the operation. The equipment used had been borrowed from a construction company. It was held that it was not a nuisance, and was a proper object to have been in that place. No negligence was found).

[41]Ching v. Surrey County Council [1909] 2 K.B. 762, approved [1910] 1 K.B. 736, 743 (in which a 9 year old boy tripped when his foot got caught in a hole in the paving on the school ground. The existence of the hole had been known by the authorities for six months. It was a statutory duty of the defendants to keep the premises in a state of repair and they were found liable. "If they are injured by a neglect of a statutory duty with respect to a place where they are expected to play, they are entitled to make those upon whom the statute has imposed the duty, responsible for injuries sustained by them through breach of duty."); Pook v. Ernesttown School Trustees [1944] 4 D.L.R. 268, O.R. 465, O.W.N. 543 (where a 14 year old boy injured his leg as the result of a fall in the school grounds onto some debris which had not been removed. The board was liable).

[42]Jackson v. London County Council (1912) T.L.R. 359 (a contractor had left a mixture of sand and lime in the schoolyard. A boy's eye was injured when another boy threw a lump of lime at him. The headmaster was negligent even though he had previously phoned the contractor and requested its removal. The contractor was also found to be negligent for failing to remove it "within a reasonable time of the request to do so").

CHAPTER V

PROOF OF NEGLIGENCE

1. Burden of Proof

Almost every case brought to trial must have a winner and a loser, though occassionally there is a draw. As a precaution to ensure that this will always be so, one of the parties is always assigned the "burden of proof." This burden carries with it the responsibility of amassing the preponderance of favorable evidence or else suffering defeat. In most cases involving negligence this responsibility lies with the plaintiff as it is he who is seeking recovery.[1] An example of an exception to this is when the defendant chooses to use the defence of unavoidable accident, he then assumes the responsibility of the burden of proof.[2]

2. Presumptions

Certain presumptions which have been accepted by the courts impose an additional burden of proof on one of the parties. For example, the standard of the reasonable man would be used to evaluate the actions of the defendant unless he was able to show reason why this would be unfair. Similarly, the plaintiff must show why the reasonable man model is not severe enough if he feels that the defendant professes to have some superior skill or knowledge relevant to the action.

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[1]William L. Prosser, Handbook of the Law of Torts (third edition; St. Paul: West Publishing Co., 1964), p. 212.

[2]Supra, p. 38.

3. Circumstantial Evidence--Res Ipsa Loquitur

At times it may be necessary to rely upon circumstantial evidence in presenting a case. This may be quite acceptable, and when it can be shown that the matter was:

> . . . under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.[3]

These circumstances give rise to what is called the principle of res ipsa loquitur and with it there is a somewhat modified application of the burden of proof.

In Canada, the authority case on this topic is Temple v. Terrace Transfer Ltd., in which Tysoe, J.A. states:

> . . . . In my view the plaintiff commences with an onus of establishing negligence on the part of the defendant resting upon him. If he proves, to the satisfaction of the tribunal, facts which bring the maxim into operation, then unless the defendant produces an explanation "equally consistent with negligence and no negligence," to use the words of Duff, C.J.C. in United Motors Service Inc. v. Hutson, [1937] 1 D.L.R. 737, 738, 739, [1937] S.C.R. 294, 4 I.L.R. 91, the plaintiff will succeed. But where the plaintiff comes forward with such an explanation, the burden of establishing negligence still remains with the plaintiff. If the tribunal is left in doubt whether, on the mass of evidence, negligence on the part of the defendant ought to be inferred, the plaintiff should fail.[4]

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[3] Scott v. London & St. Katherine Docks Co., [1865] 3 H. & Co. 596, 159 Eng.Rep. 665 (wherein some bags of sugar were dropped on the plaintiff through the negligent operation of a crane).

[4] Temple v. Terrace Transfer Ltd. (1966) 57 D.L.R. (2d) 631, 641, (in which a truck in the shop of the defendants for repair, caught fire due possibly, to the negligent actions of its employees); Malone v. Trans Canada Air Lines [1942] O.R. 453, [1942] 3 D.L.R. 369, (an

This particular approach is more lenient upon the defendant than what is practiced by either the English[5] of American Courts.[6]

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aircraft crashed during a routine landing, killing all aboard. Res Ipsa Loquitur applies". . . with experienced and careful pilots and proper equipment, a passenger has the right to expect that he will be carried safely to his destination").

[5]Ibid., p. 640, and Barkway v. South Wales Transport Co., Ltd., [1948] 2 All E.R. 460, (where a bus crashed over an embankment injuring numerous passengers and killing four others. The mishap was caused by a blowout of one of the tires. ". . . it was necessary for the defendants to prove either that the burst itself was due to a specific cause which did not connote negligence, or, if they could point to no such specific cause, that they had used all reasonable care in the management of their tyres"); Wakelin v. The London and South Western Railway Company (1886) 12 A.C. 41 (where the plaintiff's husband was found dead on railway tracks at a level crossing). Scrimgeour v. Board of Management of Canadian District of the American Lutheran Church [1947] 1 W.W.R. 120 (where an 18 year old received burns requiring the amputation of three fingers as the result of a shock received from a faulty desk lamp in a school residence. The defendants showed that no regular inspection could have disclosed the fault and were exonerated). Langham v. Wellingborough School Governors and Fryer 147 L.T. 91, (1932) 101 L.J.K.B. 513 (in which a 15 year old boy was struck in the eye with a golf ball while walking down the school corridor. The ball had been hit with a stick by a fellow student in the playground, and had come through an open doorway. The principal showed that boys were not in the habit of hitting golf balls with sticks in the school ground, and therefore it could not have been anticipated. Therefore, the supervision was adequate for the situation).

[6]William L. Prosser, Handbook of the Law of Torts, (third edition; St. Paul: West Publishing Co., 1964), pp. 215-232.

CHAPTER VI

CAUSATION AND APPORTIONMENT OF DAMAGES

For every injury or loss which occurs, there obviously must have been a cause. This very simply, is causation, and it encompasses every force, action and non-action which played a part in the occurrence. However, "an act or omission is not regarded as a cause of an event if the particular event would have occurred without it."[1] To determine what is to be considered a cause, a rule has been devised with which to measure the defendant's actions. This rule states that if the defendant's conduct is to be considered a cause of the event, then it must have been "a material element and a substantial factor in bringing it about."[2] The fact of causation is essential to liability but it does not determine it as other factors may intervene,[3] and thus if it is decided that causation does not exist the case is closed.

Assuming that causation did in fact exist, it is then necessary to determine to what extent the defendant could be held responsible for the consequences of his actions.[4] This latter question will be dealt with more fully in the following chapter.

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[1]William L. Prosser, Handbook of the Law of Torts (third edition; St. Paul: West Publishing Co., 1964), p. 242.

[2]Ibid., p. 244.

[3]Ibid., p. 245.

[4]John G. Fleming, The Law of Torts (third edition; Sydney: The Law Book Company of Australasia Pty Ltd., 1965), p. 176.

Once liability has been determined, then it must be ascertained what portion of the total damages are to be assigned to the defendant.[5] Where there is reason and a logical basis for splitting this into parts, it is done, but when this is not possible the total loss is assigned to the defendant.[6] Where two actions are necessary for the event to occur or where two simultaneous actions could each have caused the event singly, then each of the defendants is liable for all of the damage. Thus as an example, if a repairman left a springboard improperly secured to its stand and the pool attendant left the pool unlocked permitting a bather to injure himself on the board, both would be liable.[7]

In order to affix the amount of damages the court must determine the value of the damaged object or person. "Value is an estimate of worth at the time and place of the wrong."[8] Therefore a life which was afflicted by terminal disease is not credited usual life expectancy, and property which is damaged is judged accordingly.[9]

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[5]See also Chapter 10:1 on "Contributory Negligence."

[6]Prosser, op. cit., p. 248; Fleming, op. cit., pp. 181-184.

[7]Prosser, op. cit., p. 251.

[8]Prosser, op. cit., p. 256.

[9]Prosser, op. cit., pp. 255-256; Fleming, op. cit., p. 180.

CHAPTER VII

PROXIMATE CAUSE

Assigning the cause of an accident to a particular act does not preclude the affixation of liability to the actor as he may not be held legally responsible for the consequences of his act. "This is essentially a problem of law"[1] and as such must be determined by the court rather than by jury. To be held liable for the damage or injury the defendant's action must have been the "proximate cause" of said loss. Chief Justice Davies states that "if, in the absence of direct proof, the circumstances which are established are equally consistent with the allegations of the plaintiff as with the denial of the defendants, the plaintiff must fail."[2]

Supreme Court Justice Egbert in Duce v. Rourke; Pearce v. Rourke,[3] reviewed the English and Canadian cases of the previous thirty years which dealt with proximate cause and he concluded that:

> the "direct: or "effective" or "proximate" cause of an injury is to be arrived at . . . from the web of circumstances surrounding the injury on the basis of what a reasonable man familiar with that

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[1]William L. Prosser, Handbook of the Law of Torts (third edition; St. Paul: West Publishing Co., 1964), p. 282.

[2]Dunn v. Dominion Atlantic Railway [1920] 2 W.W.R. 705, 60 S.C.R. 310, 52 D.L.R. 149. (A man, drunk and disorderly on a train, was put off the train by the conductor in the middle of the night at a closed station. The man was found the next day dead between the tracks, as he had been hit by a later train. Ejecting him from the train was not considered a proximate cause of his death, but rather his own negligent action).

[3]Duce v. Rourke; Pearce v. Rourke (1951) 1 W.W.R. (NS) 305, (in

> type of circumstance would select as the actual cause of the injury--in other words, it is to be selected on practical considerations of justice and expediency.

Once the cause has been selected, it is considered to be the cause of all injuries resulting from the act or omission[4] until its effectiveness is exhausted or diverted by some intervening variable.[5] The case with which remoteness is now compared is known as the Wagon Mound (No. 1).[6]

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which Pearce had car trouble and had asked Duce to assist him. The two plaintiff's were fastening a tow rope to Pearce's car when the defendant smashed into the back of it propelling it into Duce's car and both of the plaintiffs personally. Each of them and the car suffered damages. In addition, while Pearce was being taken to the hospital his tools were stolen from his car. Each of the plaintiffs received compensation for their alleged losses and injuries with the exception that the loss of Pearce's tools was not considered to be a proximate result of the accident and thus liability for their loss could not be attached to the defendant).

[4]Re Polemis [1921] 3 K.B. 560 (until recently, this case formed the basis for decisions related to the proximate cause and remoteness of the damage or injury. In this case a stevedore negligently dropped a plank into the hold of a ship in which gasoline had been stored. As it hit the bottom of the hold it caused a spark which ignited the gasoline vapour which had not yet dispersed, and ultimately the entire ship was lost. The defendants were held responsible for all of the damage because the stevedore's negligent action was the DIRECT cause of the damage. However, it can be seen that it is rather improbable that anyone could have foreseen these consequences as stemming from the negligent handling of a plank, and it is for this reason that this case is no longer acceptable in questions of remoteness).

[5]Duce v. Rourke; Pearce v. Rourke, op. cit.

[6]The Wagon Mound (No. 1) [1961] A.C. 388, [1961] 1 All E.R. 404. (In this case the "S.S. Wagon Mound" was at a dock taking in bunkering oil. In the process a large quantity of the oil was spilled into the bay. At the plaintiff's wharf 600 feet away, workmen were engaged in a refitting operation on two ships. The work they were doing involved welding. The plaintiff had been assured by the defendant that it was safe to weld and so the work had continued. On a day after the "S.S. Wagon Mound" had already put to sea, a spark from the welding fell into the water below the plaintiff's wharf and apparently ignited some cotton or rags floating on the surface. The flames then ignited the oil and

the effect of this case is essentially a reaffirmation of the principle in Donoghue v. Stevenson[7] in that the damage must have been a reasonably foreseeable consequence at the time and place of the

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the resultant fire caused extensive damage to the plaintiff's wharf and the two ships. The plaintiff sued for damages in negligence and nuisance. A long and arduous trial and appeal finally held that the Polemis rule holding one responsible for direct consequences whether foreseeable or not is unacceptable. It was then determined that a reasonable ship's engineer would have foreseen that his negligent action in allowing the bunkering oil to spill into the bay was liable to cause a fire, which it did. Thus the defendant was held negligent and liable). The Wagon Mound (No. 2) A.C. [1966] 2 All E.R. 709 supports the earlier case. (In this case the facts are the same as in No. 1, however here the owners of the two ships which were docked at the damaged wharf at the time of the fire sued the owners of the "Wagon Mound" for damages to their ships. They were also successful in their suit thus affirming the first case). A Saskatchewan case refused to accept the authority of Wagon Mound No. 1 and instead based its decision on the Polemis case on the grounds that the Wagon Mound had never been heard in the Supreme Court of Canada whereas the Polemis had, and thus the judge felt bound by it. (This case, Shulhan v. Peterson (1966) 57 D.L.R. (2d) 491, involved a car smashing into another stationary vehicle. The owner of the second car was able to recover for all damages to his vehicle as well as costs incurred in renting and insuring a replacement car while his was being repaired. However, this case would have reached the same conclusions had Wagon Mound been followed as evidenced by another case); Swejda v. Martin [1969] D.L.R. (3d) 426, 437, 438, (involved injuries to a farmer and the death of his father in a car accident. He was able to recover for his injuries and the resultant loss of production on his farm when he was unable to work on the basis of the Wagon Mound cases. Tucker, J. in his decision quotes from Wagon Mound No. 1:

> It is a principle of civil liability, subject to qualifications which have no present relevance, that man must be considered to be responsible for the probable consequence of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behaviour. (pp. 138-139).

and further that "if the wrong is established the wrongdoer must take the victim as he finds him").

[7] Donoghue v. Stevenson [1932] A.C. 562, and see also supra, pp. 12, 13.

action. This case also suggests that the risk should be considered on the basis of a general type rather than a particular one, as for example the similarity between burning and exploding would not deny recovery.[8] However, not all interventions relieve the actor of liability, as if the intervention is one which flows naturally as a consequence of the

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[8]Hughes v. Lord Advocate [1963] A.C. 837, [1963] 1 All E.R. 705 (in which some workmen had removed a manhole cover in order to work on some telephone cables. They had erected a shelter tent over the open hole, and had placed four paraffin lamps around the tent. They then went for coffee, but before leaving took the precaution of pulling the ladder out of the hole and closing the doorway of the tent. An eight and a ten year old boy came along, put the ladder into the hole and taking one of the lamps, went down. Shortly after they came out one of them tripped on a rope and the lamp fell into the hole. There was an explosion and the plaintiff fell into the hole suffering extensive burns. It was held that it was reasonable to expect that a child might get burned as a result of leaving the lamps without anyone staying behind to assure the safety of the site. It was also reasonable to expect a child might fall into the hole. These things in fact happened, and although there were numerous intervening events which could not have been foreseen, they cannot detract from the risk created by the negligence. The defendants were liable); Lewis v. Carmarthenshire County Council (1955) 2 All E.R. 1403, [1955] A.C. 549, (A teacher had prepared two children to go for a walk. She had then gone to the lavatory leaving the children in a room. She was detained somewhat as she stopped to dress a wound of another injured child. In all she was away about 10 minutes. Meanwhile, one of the former children, a 4 year old, had strayed onto the road. A truck swerved to avoid the child and struck a telegraph pole, killing the driver. It was claimed that the child would not have been on the road if he had been supervised properly. The teacher was found negligent and $3000 damages were awarded the wife of the deceased. An appeal was unsuccessful. A final appeal to the House of Lords found that the teacher was not negligent, but the school authority was in having failed to provide proper gates to keep a child of this age enclosed); Bolton v. Stone [1951] A.C. 850, [1951] 1 All E.R. 1078, (this case resulted from a cricket match during which a ball was hit 100 yards over a fence to strike the plaintiff who was on an adjoining roadway. The road was one which was seldom used. It was shown that a ball had been hit over the fence only six times in the past 30 years. The questions which had to be answered in this case were whether or not it was foreseeable that this type of incident could occur, and then the remoteness of the foreseeability. It was held that the possibility, though foreseeable, was too remote for the plaintiff to recover).

initial wrong and thus should have been foreseen, liability still exists.[9] Also:

> . . . even though an injury would not have been sustained but for the independent act of a third party, defendant will be liable if, as a man of ordinary prudence, he should have anticipated that, in the circumstances, the injury would be a not improbale consequence of his own action.[10]

The determination of negligence requires that the injury or loss as a direct result of a particular act or omission must have been reasonably foreseeable to an ordinary prudent person, and if it was not there can be no negligence.[11] But once negligence has been established, the fact that the actor did not anticipate the resultant damage does not limit the liability.[12] There is some limit as to how far the liability is to be extended however, as Egbert J. states:

> A wrongdoer is not liable ad infinitum for the consequences of his wrongful act. In order to impose liability the damage

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[9] Duce v. Rourke; Pearce v. Rourke, op. cit.

[10] Pearson v. Vintners Ltd., and Chapman [1939] 1 W.W.R. 271, 53 B.C.R. 397, [1939] 2 D.L.R. 198, (in which four intoxicated passengers were in a hotel elevator. The plaintiff was about to enter the elevator when it suddenly began to ascend causing him to fall backwards seriously injuring himself. The motion of the elevator had been caused by one of the inebriates bumping the elevator operator causing him to activate the starting lever. It was held that the operator could easily have avoided the situation and he and his employer were therefore negligent).

[11] Duce v Rourke: Pearce v. Rourke, op. cit., (Egbert, J.: "Foreseeability or probability of consequences is highly relevant in a consideration of the existence or non-existence of negligence, and if injury could not reasonably have been foreseen, as the natural and probable result of the act or omission, no negligence can be attributed to the wrongdoer").

[12] Ibid.

> must be the direct consequence, or direct effect, or direct result, of the defendant's act, and be rightly caused by it, for otherwise the damage is too remote to be recoverable but the word "direct" when used in this sense does not have its strict logical significance, but is merely used comparatively to mean a cause which is sufficiently direct, sufficiently connected with the damage done, to be recognized by the law as a ground for liability.[13]

This has been similarly explained by Rose, J.:

> . . . the consequences which may reasonably be expected to result from a particular act are material only in reference to the question whether the act is or is not a negligent act, and that, given the negligence and given the damage as a direct result of that negligence, the anticipation of a person whose negligent act differs not only in extent but in type from the damage that might have been anticipated.[14]

Additional information on this will be dealt with in the section on contributory negligence in Chapter X.[15]

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[13] Ibid.

[14] Jeffery & Sons Ltd. v. Copeland Flour Mills Ltd., (1922) 52 O.L.R. 617, 630, (where in the excavation for one building, damage was done to the foundation of another causing the building to settle).

[15] Infra. p. 95, Ch. 10.

CHAPTER VIII

LIMITATIONS OF DUTY

1. Introduction

Duty is that obligation which the law demands of an individual to conform to a particular standard of conduct in the interests of others. This obligation extends to all of those to whom Lord Atkin has referred to as "neighbours,"[1] a designation which encompasses all of those persons whom a reasonable man[2] in the circumstances involved should be able to recognize as possibly being affected by his actions.[3] The extent of this duty is a question of fact and must be assessed by the court in hindsight.

2. Acts and Omissions

Cases which involve injury or loss as a result of the actions of an individual are reasonably straight forward, but the more intricate situations to sort out are those in which the defendant has merely refused to intervene in such a way as might have avoided or reduced the

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[1] Supra, p. 12.

[2] Supra, p. 13.

[3] Sundin v. C.N.R. (1951) 3 W.W.R. (N.S.) 625, 69 C.R.T.C. 170, [1952] 1 D.L.R. 447, (in this case a switchman stumbled over a protruding rail tie while completing a coupling and fell beneath the wheels, losing a leg as a result. The Railway was negligent in having failed to provide a safe place to work, and in having spotted a car over a switch. Martin, C.J.S. states that "the duty to take care to avoid injury is owed to all who are likely to suffer injury if the duty is neglected").

harm. This passive inaction is referred to as "nonfeasance"[4] as opposed to "misfeasance"[5] which involves a definite act. In the cases involving misfeasance it is simply necessary to establish foreseeability and causation. Nonfeasance necessitates establishing some relationship between the parties which imposes an obligation to act in the welfare of the plaintiff.[6] The question is one of whether the defendant has become so involved in the concerns of the plaintiff that his inaction seriously affects the plaintiff's interests or whether they are simply not of benefit to him.[7] It must be clearly understood however, that one cannot be responsible for providing against dangers which could not have been reasonably anticipated by the defendant.[8] Where the defendant

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[4]William L. Prosser, Handbook of the Law of Torts (third edition; St. Paul: West Publishing Co., 1964), 334.

[5]Ibid.

[6]Ibid., p. 335; Foster v. London County Council, Times Educational Supplement, 10 December 1927 (where an 11 year old girl pulling a rusty pen nib from a penholder with a pair of scissors injured her eye. She had not been warned of the danger by the teacher, and was awarded £100 damages); Gagnon v. Freres des Ecoles Cretiennes (1938) 76 Que. S.C. 38 (the plaintiff sustained a fractured hand in a playground fight with another student. The school authorities would not call the doctor who was retained by the institution and consequently the injury was aggravated. The school was liable for its negligence).

[7]Ibid., p. 336.

[8]Higgins v. Commox Logging and Railroad Co. [1927] S.C.R. 359, [1927] 2 D.L.R. 682, affirming [1926] 3 W.W.R. 417, 37 B.C.R. 525, [1926] 4 D.L.R. 852, (where a steel cable snapped and wrapped itself around another. The resulting friction caused sparks igniting some tree bark which fell into some brush. The resultant fire was considered to be a pure accident and the defendants were not liable); Powlett v. University of Alberta [1934] 2 W.W.R. 209 (where the University was liable when a freshman turned to insanity as a result of initiation proceedings conducted by senior students with the consent of the university).

professes to command some superior skill or knowledge he is expected to exercise that ability in guarding against danger, and thus a physical education specialist is bound to a higher duty in the performance of his duty.[9]

Canadian courts have adopted a very contemporary attitude in respect to the degree of responsibility to be expected of a person supervising children. In this respect they have recognized that children must learn to accept an increasing amount of responsibility for their own welfare,[10] and that therefore, consideration must be

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[9]Birch v. Virden Drilling Co. (1957-58) 23 W.W.R. 673, (which is a very technical case involving some repairs to the casings of an oil well. The defendant company, through the negligence of its employees, in their contract with the plaintiff caused damage to the pumping equipment and the casings. As a result it became necessary to drill a new well and provide new equipment, the expenses for which the defendant company was held responsible); Baxter v. Barker, Times, 24 April, 1903, reversed Times CXL (November 13, 1903), p. 12. (In this case some boys were carrying a flask of sulphuric acid down a school hallway. Another, playing tag, bumped into the jar and was burned with the acid. The boys playing tag were there against the rules. The headmaster was assessed 50 £ damages, as no steps had been taken to enforce the school rule, and the chemistry teacher should have ensured that the hallway was clear before the boys were sent to carry the flask across the hallway. On appeal, it was held that this was too much to expect of the teacher, and that the boys were old enough that they should have been more careful. The case was dismissed).

[10]Hudson v. Governors of Rotherham Grammar School (1938) Yorkshire Post, March 24 & 25. (Some boys were playing with a cricket roller contrary to school rules. The roller ran over one of them. The parents then sued the Governors and the teacher. Hibery, J. says:

> It was not suggested for the plaintiff that anybody could reasonably say that a master must watch boys, not merely in classes, but throughout every movement of their school lives.
>
> What has a reasonably careful parent to do? Suppose a boy of yours has some other little boys, who are friends of his, coming to tea on a Saturday afternoon and you see them all playing in the

given to the age of the child, the activity, and any special

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garden. Suppose your garden roller happened to be there. Would you consider you had been neglectful of your duty to the parents of those other boys because for five minutes, you had gone into the house and two of them had managed to pull the roller over the third?

Would you think that, in those circumstances you had failed to exercise reasonable supervision as a parent? These things have got to be treated as matters of common sense, not to be on Mr. Johnson any higher standard of care than that of a reasonably careful parent.

If the boys were kept in cotton-wool, some of them would choke themselves with it. They would manage to have accidents: we always did, members of the jury--we did not always have action at law afterwards.

You have to consider whether or not you would expect a headmaster to exercise such a degree of care that boys could never get into mischief. Has any reasonable parent yet succeeded in exercising such care as to prevent a boy getting into mischief and--if he did--what sort of boys should we produce?

In another case, Smith v. Martin [1911] 2 K.B. 775 a teacher sent a 14 year old girl to poke the fire and draw the damper. The girl's dress caught fire and she was burned. It was held that this was outside the scope of the teacher's authority, and the plaintiff was awarded £ 300 that the teacher was to pay. On appeal, the authority of the school was required to pay. Lord Justice Farwell said:

In my opinion the Education Acts are designed to provide for education in its truest sense. Such education includes the inculcation of habits of order, obedience and courtesy; such habits are taught by giving orders and, if such orders are reasonable and proper under the circumstances of the case, they are within the scope of the teacher's authority even though they are not confined to bidding the child to read or write, to sit down or to stand up in school, or the like. It would be extravagant to say that a teacher has no business to ask a child to perform small acts of courtesy for herself or for others, such as to fetch her pocket handkerchief from upstairs, to open a door for a visitor or the like.

It is said that these are for the teacher's own benefit, but I do not agree. Not only is it good for the child to be taught to be unselfish and obliging, but the opportunity of running upstairs may often avoid punishment. The wise teacher who sees a child becoming fidgety may well make the excuse of an errand for herself an outlet for the child's exuberance of spirits very much to the benefit of the child. Teachers must use their common sense, and it would be disastrous to hold that they can do nothing but teach.

circumstances relevant to the case.[11]

A related situation is one in which an individual who is under no particular obligation to do a particular thing agrees to do it and then fails to carry out his promise or does it in such a manner as to create a dangerous condition. When an individual does agree to act in some manner as suggested, he also accepts a duty to see that it is carried out fully in a safe manner.[12] For this reason the practitioner should very seriously consider the consequences which are possible if he agrees to make repairs to equipment.

3. Rescue

A question of interest to physical educators is the status of a person who endangers his own life in an attempt to rescue another person

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[11]Schade v. Winnipeg School District (1959) 28 W.W.R. 577, affirming (1959) 27 W.W.R. 546, 66 Man. R. 335, 360, (1959) 19 D.L.R. (2d) 299. (A boy was playing scrub baseball in the schoolyard during the noon hour and tripped over an 18" stake which was in the ground for construction purposes. The boy, who was 13, suffered a broken arm. All of the students had been repeatedly warned to stay away from the site of the construction. It was held that there was no negligence on the part of the school or contractor. Schulz, J.A. said: "I agree with the emphasis the learned trial judge placed on the necessity of developing a sense of self-responsibility on the part of the children. As he points out, the realization of this fact by the courts has led to a changing attitude and a more practical approach to the question of supervision by school authorities. While it must be recognized there is a duty on teachers to supervise certain school activities, a duty that of necessity bears some relation to the age of the pupils, the special circumstances of each case and, in particular, the type of activity engaged in, nevertheless it must also be recognized that one of the most important aims of education is to develop a sense of responsibility on the part of the pupils, personal responsibility for their individual actions, and a realization of the consequences of such actions").

[12]Prosser, op. cit., p. 342.

in apparent danger. In this regard, MacDonald, J.A. said:

> In my opinion, the principle deducible from the "rescue" cases is this: When a person in breach of a duty towards another, places the latter in danger, he, as a reasonable man, should foresee that anyone seeing such other in danger will react to the spectacle and attempt a rescue. It is thus the danger, actual or apprehended, to that other which brings the rescuer within the ambit of the negligent party's duty to take care.[13]

And Cardozo, J. said in an earlier case:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions in tracing conduct to its consequences. It recognizes them as normal. The wrong that imperils life is a wrong to the imperilled victim: it is a wrong also to his rescuer. . . . The risk of rescue, if only it is not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had . . . . It is enough that the act, whether impulsive or deliberate, is the child of the occasion.[14]

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[13] Dupuis v. New Regina Trading Co. [1943] 2 W.W.R. 593, 603 (in which an elevator operator became imperiled when her foot caught between the door and the shaft wall leaving her hanging upside down below the elevator. The plaintiff's husband in attempting a rescue, fell down the shaft and was killed. As the defendant company was not negligent toward its employee, it could not be toward the rescuer. There was no liability).

[14] Wagner v. International Railway Co. (1921) 232 N.Y. 176; 133 N.E. 437, 438.

CHAPTER IX

OCCUPIERS AND OWNERS OF PROPERTY

I. Introduction

> "Occupiers Liability" is a term signifying that branch of the law of negligence which is concerned with the liability of occupiers of premises towards entrants upon their premises. In general, liability is determined by first defining the legal category of the entrant, and then applying to him a precise duty, which is the duty owed by this occupier to that class of entrant.[1]

The responsibility for the condition of property is based upon the control of the property rather than ownership, and "hence, the visitor must look to the tenant, and not to the landlord, for compensation."[2] This does not subject the occupier to any real hardship however, as the law generally holds that no one "should be obliged to exert himself on behalf of another"[3] unless, at least, there is some form of restitution in return. What exists in fact, is no more than the common duty of care afforded to persons in order to successfully avoid any negligence actions. However, because the occupier has the right to use the premises as he wishes he is placed under an obligation to supervise the actions of the visitors to ensure that they do not

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[1] D.C. McDonald, The Law of Occupier's Liability, (Edmonton: a report to the Institute of Law Research and Reform, The University of Alberta; April, 1969).

[2] John G. Fleming, The Law of Torts (third edition; Sydney: The Law Book Company of Australasia Pty Ltd., 1965), p. 406; Ingle v. Hanson [1947] 2 W.W.R. 698, [1947] 4 D.L.R. 420, 63 B.C.R. 481 (fence fell on child).

[3] Fleming, op. cit., p. 405.

imperil others to any unreasonable degree.[4] In the event that he feels certain behavior is unacceptable he must see that it is modified or else remove the offenders from the premises.

That these points are vital to the physical educator should be obvious, as in most instances the physical educator will be the occupier of the premises and so responsibility for the condition of the property and the chattels[5] will lie with him. For example, he must take care to ensure that areas used for physical education activities, as well as all equipment employed are maintained in safe condition. This may sometimes demand his personal attention or it may involve some system of reporting irregularities to an appropriate third party. It is strongly recommended that reports be made in writing and a carbon copy kept on file. When repairs have been completed, the date of completion should be recorded.

The law does make some distinctions regarding the status of various persons on the premises according to the nature of the purpose for which they are present. These distinctions in turn assign varying degrees of obligation to the occupier.

2. Persons Entering By Contractual Right

The existence of a contract, even though it is only an admission

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[4]Fleming op. cit., p. 406; Randall v. Ahearn and Soper (1904) 34 S.C.R. 698 (where an Ottawa Electric Company employee received a shock while on a power pole, fell, and was injured).

[5]Fleming, op. cit., p. 408.

ticket, between the occupier and the person entering his premises, places the occupier under obligations over and above the common law duties owed to "invitees."[6] In general "an occupier who admits a person for reward for a mutually contemplated purpose must ensure that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them."[7] And again

> When persons enter premises under contract, the circumstances may be such that, unless there is an express or implied term to the contrary, there is an implied warranty that the premises are as safe as reasonable care and skill can make them. This is not an absolute warranty, and does not cover defects, which could not be discovered by the exercise of reasonable care and skill.[8]

In this respect, the additional responsibilities assigned the occupier are threefold.

Firstly, there is no limitation to unusual dangers, and awareness of potential danger on the part of the injured party does not disqualify

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[6]Infra, p. 81.

[7]Fleming, op. cit., p. 410; Stewart v. Cobalt Curling and Skating Association (1909) 19 O.L.R. 667 (where a balcony railing collapsed and spectators fell twelve feet onto the ice); Brown v. B. & F. Theatres [1947] S.C.R. 486, [1947] 3 O.L.R. 593 (the plaintiff fell down a flight of stairs when she mistakenly opened the poorly marked basement door instead of that leading to the ladies room); Dixon v. City of Edmonton [1925] 1 D.L.R. 80, [1924] S.C.R. 640 (the city closed off a portion of a street and intersecting streets in order to operate a bobsled run during a winter carnival. They employed a starter to collect tolls and to see to the safe starting of sleds. On the run was a dangerous corner 600-700 feet from the starting point and out of sight of the starter. The plaintiff's sled tipped at this corner. While she was trying to get clear another sled tipped at the corner. Then a third one struck the plaintiff and severely injured her. The defendant was found negligent in the operation of the slide for having started the sleds too close together, and having failed to place anyone at the dangerous corner to assist persons off the slide).

[8]D'Auteuil v. Beausjour Investment Ltd. and Colmer (1962) 37 W.W.R. 156, 161, quoting Charlesworth on Negligence, 3rd ed., p. 180.

an action.[9] Thus, an adult might have been aware of the dangerous condition of the steps of a grandstand and yet still be successful in an action against the organization which sold him his ticket.[10] Secondly, the occupier is responsible not only for his personal negligence, but also for that of independent contractors who have been engaged for any form of construction or repair of the premises.[11] And finally, the occupier is even responsible for defects in the premises or chattels which were created prior to his occupation of the property.[12] These facts are just cause for the physical educator to give a great deal of consideration to the staging of any forms of entertainment for which he intends to charge admission. The basis upon which these additional responsibilities are imposed seems to be that the main purpose of the contract is the use of the premises rather than where it is simply incidental to some other use,[13] and thus were not invoked where a

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[9]Fleming, op. cit., p. 410.

[10]Dunster v. Hollis [1918] 2 K.B. 795. (Here the tenant was successful in his suit against his landlord for an injury on a common staircase even though the plaintiff had been previously aware of the dangerous condition).

[11]Francis v. Cockrell (1870) L.R. 5 Q.B. 501 (where the proprietor was held responsible for the injury of the plaintiff when the grandstand collapsed even though due to the faulty workmanship of an independent contractor who completed his work prior to the occupation of the premises by the defendant).

[12]Francis v. Cockrell, loc. cit.; Balne v. Sunnyside Amusement Co. Ltd., [1931] O.R. 549 [1931] 4 D.L.R. 487 (where the plaintiff was injured when an improperly loaded amusement ride broke. There was no emergency brake provided for such emergencies. The restraining bar on the seats was insufficient to keep passengers from falling out in case of an accident. The company was liable).

[13]Fleming, op. cit., p. 411.

youngster slipped on a highly polished floor during a physical education class.[14]

The matter of control of the actions of others using the premises is also important under the existence of a contract in situations wherein there are dangers unforeseeable to the ordinary spectator.[15] But where the risks are or should be apparent to the spectators there is no liability if reasonable precautions for their safety have been taken by the occupier.[16] Regarding this latter case it is "a question of fact whether the barrier was a reasonably adequate safeguard for the protection of onlookers."[17]

3. Distinction Between Invitees and Licensees

Persons who lawfully enter by permission or invitation but with a contract are divided into the categories of either "invitees" or "licensees," a higher standard of care being owed to those classed as

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[14] Gillmore v. London County Council [1938] 4 All E.R. 331.

[15] Cox v. Coulson [1916] 2 K.B. 177, (wherein a spectator was injured by the discharge of a pistol during the performance of a play by a travelling company. The proprietor was held responsible).

[16] Murray v. Harringbay Arena [1959] 2 K.B. 529 (where a six year old boy accompanied by his father to a hockey game, was struck in the eye by a puck while seated in the front row of seats. It was held that the defendant had taken reasonable care to see that the premises were fit for use and that the plaintiff had voluntarily assumed that risk as part of the game).

[17] Fleming, op. cit., p. 413; in Hall v. Brooklands Auto-Racing Club [1933] 1 K.B. 205 the defendants were exonerated, but in Austr. Racing Club v. Metcalf (1961) 78 W.n. (N.S.W.) 1158, 1162, 106 C.L.R.

invitees. The distinction between the two is subject to much disagreement but the single test on which the discrimination seems to rest is one of the economics. Thus, if there is some material advantage to the proprietor possible as a result of the entry of the visitor, he is classed as an invitee.[18] The question for interpretation by the courts is just how far this can be extended, as for example where a parent attending a school exhibition is classed as an invitee because it was in the interest of the school to enlist parental support.[19]

Undoubtedly in most instances, the persons with whom the physical educator or recreationist will be dealing, will be classed in the preferred category of invitee, and thus an understanding of the standard of care due them is essential.

4. The standard of Care Due to Invitees

The standard of care which seems to distinguish the treatment of the invitee from the licensee is that he is owed an obligation that

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177, Green v. Perry (1955) 94 C.L.R. 606 and Chatwood v. National Speedways [1929] Q.S.R. 29 the plaintiff recovered.

[18]Gautret v. Egerton (1866), L.R. 2 C.P. 371. (Two men drowned after falling through a bridge which was in disrepair. Those using the bridge were only licensees as the owner gained no material advantage from its use. It was in the form of a gift, and one must accept a gift in the condition in which it is given or not take it).

[19]Fleming, op. cit., p. 416 from Griffiths v. St. Clement's School [1938] 3 All E.R. 537, affirmed [1941] A.C. 170. (In this case it was held that the plaintiff was an invitee, and that the defendants had in fact failed to exercise their statutory duty to repair. Thus, they were negligent, but unfortunately were not liable as the action was commenced outside the statutory limit).

positive steps be taken to make him aware of and/or eliminate not only those perils of which the occupier is aware, but also those which "a reasonable inspection would disclose."[20] In other words it is the duty of the occupier to the invitee to ensure that the premises are reasonably safe,[21] in that they are free of unusual dangers.[22] But at the same time it is still essential that the invitee exercise reasonable

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[20]Fleming, op. cit., p. 421 and Kennedy v. Union Estates Ltd. [1940] 1 W.W.R. 209, 55 B.C.R. 1, [1940] 1 D.L.R. 662 affirmed [1940] S.C.R. 625, [1940] 3 D.L.R. 404. There can be a breach of duty through failure to know what we ought to know to insure the safety of others with whom one has commercial relations for a common purpose. In this case some customers were hurt in the collapse of a bench while attending a concert presented by someone other than the proprietor of the resort, but with his permission. The benches had been placed there by the proprietor for concert spectators and an inspection would have disclosed the rotten condition of the timbers; Mitchell v. Johnstone, Walker Ltd. [1919] 3 W.W.R. 24, 47 D.L.R. 293; McLean v. Y.M.C.A. [1918] 3 W.W.R. 522, 14 Alta. L.R. 58.

[21]Edglie v. Woodward Stores Ltd. [1936] 1 W.W.R. 502, 50 B.C.R. 403 (where the plaintiff, a customer in the store, slipped on an orange peel on the stairway and was injured); Finigan v. City of Calgary and Heritage Park Society (1962) 62 W.W.R., 115, 119 (where the plaintiff stumbled on a protruding root in a pathway in the public park and was severely injured).

[22]Campbell v. Royal Bank (1963) 41 W.W.R. 91, (1963) 37 D.L.R. (2d) 725, reversed (1964) 46 W.W.R. 79, [1964] S.C.R. 85, (1964) 43 D.L.R. (2d) 341. This case dealt with a middle aged woman who slipped on a damp floor in a bank on a snowy day in February. It was found that a wet floor in a public place constituted an unusual danger though two judges dissented in this decision. This case would apparently overrule a similar case with almost idential facts in which the opposite decision was reached: Reith v. Safeway Stores Ltd. [1936] 1 W.W.R. 481. The latter case was based on Thomas v. Quartermaine (1887) 18 Q.B.D. 685, 56 L.J.Q.B. 340 which said "the duty of an occupier of premises which have an element of danger reaches its vanishing point in the case of those who are cognizant of the full extent of the danger and voluntarily run the risk," and further at p. 699 "one cannot sue another in respect of danger or risk not unlawful in itself that was visible, apparent and voluntarily encountered by the injured person." It is interesting to note that these cases were not referred to in the Campbell case.

care for his own safety.[23] All decisions regarding the invitor and invitee relationship start from the rule in Indermaur v. Dames[24] in which Willes, J. says:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact.

In some cases the mere warning of the presence of danger and its possible risk would be sufficient to exonerate a defendant, as where the knowledge of the risk could be considered to provide adequate protection to someone exercising reasonable care.[25] However, where due to the age of the plaintiff or the nature of the danger, mere knowledge of its presence is not sufficient to ensure the safety of a person exercising reasonable care, "some other positive precaution such as fencing off"[26] or complete removal of the hazard becomes essential.

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[23] McColl v. Calgary Y.M.C.A. [1936] 1 W.W.R. 81.

[24] (1866) L.R. 1 C.P. 274, 288, 35 L.J.C.P. 184, affirmed (1867) L.R. 2 C.P. 311, 36 L.J.C.P.181.

[25] Such v. Dominion Stores (1963) 37 D.L.R. (2d) 311, (where there was an icy patch on the parking lot of which the plaintiff was fully aware and yet proceeded to walk on it. Volenti non fit injuria applied and the action was dismissed).

[26] Fleming, op. cit., p. 422.

> Signs of inviting people to do things or use premises or equipment "at your own risk" do not fix owners or occupiers with knowledge of dangerous premises any more than do signs warning customers that parking or leaving coats and hats is at their own risk.[27]

Where warning of danger has been given, it must have enabled the invitee to be fully aware of the possible nature and extent of the risk if volenti non fit injuria[28] is to be applied. Furthermore, it is possible that the warning given, though not sufficient for exoneration of the defendant,[29] may be used as evidence of contributory negligence.[30]

The physical educator then must be familiar with all of the possible sources of risk to participants and spectators in the form of equipment, premises, activities, and methods of instruction employed. He would be wise to eliminate as many of these dangers as possible, and then in writing bring to the attention of all persons, the hazards which remain. When in doubt about a situation it would be advisable to restrict or eliminate persons from the vicinity.

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[27] D'Auteuil v. Beausejour Investments Ltd. and Colmer (1962) 37 W.W.R. 156, 173 (1962) 31 D.L.R. (2d) 511.

[28] See Infra., Chapter 10.

[29] Fleming, op. cit., p. 423.

[30] Latham v. Johnson [1915] 1 K.B. 398, 411 (a 2 1/2 year old girl suffered a crushed hand when a paving stone, left in a pile on some waste land, fell on her. It was known that children frequented the land. The pile of stones was not considered to be a trap or a concealed danger); Slade v. Battersea Hospital [1955] 1 W.L.R. 207, [1955] 1 All E.R. 429 (a freshly waxed floor in the hallway, with the wax not yet polished. There was no warning of danger or the presence of wax. This was considered a concealed danger and the defendants were negligent and liable).

5. The Standard of Care Due to Licensees

A licensee must accept and use the premises as he finds them,[31] with the exception that . . . "if the licensor knows of a danger which is not apparent, or would not reasonably be apparent to the licensee, it is his duty to take steps to protect the licensee against it."[32] "Indeed, it is sufficient that the licensor was merely aware of the presence of a physical object capable of being put in a dangerous condition by the foreseeable intervention of strangers, having regard to their past behavior and propensity for carelessness or mischief."[33]

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[31] Bunker v. Charles Brand [1969] 2 All E.R. 59, (in which a workman had to traverse a dangerous part of a machine in order to get to the part of it which he was to repair. A walkway, which had originally been a part of the machine, had been removed. The plaintiff did not hold on to an available railing while crossing the dangerous area, though those in front of him had done so and crossed safely. Plaintiff was held 50% responsible for his injuries and the defendant liable for the other 50% as he had failed to provide safe access to the area even though he could easily have done so); Boivin v. Glenavon School District [1937] 2 W.W.R. 170, (wherein it was claimed that the defendant's servant had failed to place mats under a horizontal ladder. It was held however, that even if the mats had been in place, the injury would still have occurred and thus there was no liability).

[32] Baker v. Borough of Bethnal Green [1945] 1 All E.R. 135, 140 (some persons were injured and killed on faulty, poorly lit stairs leading to an air raid shelter provided by the Borough); MacDonald v. Town of Goderich (1948) O.R. 751 (where a spectator at a hockey game was injured when a balcony railing on which he was leaning, gave way resulting in serious injuries. The faulty railing was held to constitute a trap); Flynn v. Toronto Industrial Exhibition Association (1905) 9 O.L.R. 582 (a defect in the construction of merry-go-round caused it to break resulting in injury to plaintiff); McPhee v. City of Toronto (1915) 9 O.W.N. 150 (in which a park bench collapsed injuring the plaintiff).

[33] Fleming, op. cit., p. 428; Coates v. Rawtenstall Corporation [1937] 3 All E.R. 333, [1937] 3 All E.R. 602 (a chain fastened across the bottom of a slide by a mischievous boy injured another unsuspecting youngster).

This standard of care due to licensees involves only concealed dangers or traps[34] and thus it is important to consider their composition. "It involves the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger."[35] This presupposes that the licensee is exercising reasonable caution for his own safety.

Probably the most important application of the licensee classification for the purpose of this study is in connection with visitors to public places. This includes playgrounds, parks, schools, public buildings, and so on, and all who enter lawfully are licensees.[36]

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[34] Simmons v. The Mayor of the Borough of Huntingdon [1936] 1 All E.R. 596, (where a diving board in a swimming pool was located above water only 3 feet 3 inches deep. The board was 3 feet above the water. A 15 year old boy dived off and broke his neck, dying later in hospital. It was said ". . . there was what amounted to a 'trap.' The diving board, being placed where it was, was a suggestion that there was proper depth of water into which to dive. It was that trap which resulted in the death of this boy. . . .").

[35] Latham v. Johnson (supra).

[36] Conlon v. The City of St. Catherines (1956) O.W.N. 296 (a lady slipped on the steps leading to the lavatory in the city hall); Pearson v. Lambeth Borough Council [1950] 2 K.B. 353, [1950] All E.R. 682, 687, 688 (where it was held that a man visiting a public lavatory is only an invitee); Booth v. The City of St. Catherines [1948] S.C.R. 564, 567, 581, 583, [1948] 4 D.L.R. 686 (where a mayor, by proclamation, invited all the citizens to attend a celebration, and one of the persons who attended and was hit by a tower falling, was considered a licensee); MacKinder v. The City of London [1953] O.R. 52, 54, [1953] 1 D.L.R. 452 (where the trial judge held a person in a public park to be a licensee); Lamarche v. Board of Trustees of the Roman Catholic Separate Schools for the Village of L'Original [1956] O.W.N. 686, (where a swing was constructed on a slope in a large schoolyard. Because of the sloping ground, the swing had been known to tip over repeatedly prior to the accident, in fact it was necessary for some children to sit or stand on the cross bar while others were swinging to prevent its tipping. On the occasion

Regarding the actual conduct of the occupier himself, there is no difference in his obligation to licensees and invitees,[37] provided that he is aware that they are likely to be present.[38] This obligation to licensees can in most cases, be satisfied simply by suitable warning which might even be in the form of a sign.[39]

6. Trespassers

"A trespasser is any intruder who enters land without the occupier's consent,"[40] for his own purposes, and as such assumes the risk of the condition of the premises as he finds them.[41] Consent can be inferred however, by the absence of any attempt on the part of the occupier to indicate his objection to the entry,[42] as "the occupier

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of the accident the boys on the cross bar decided to jump off "for fun" and the plaintiff was injured severely so that he is permanently paralyzed. The defendants were liable for damages of $46,097).

[37] Green v. C.P.R. [1937] 2 W.W.R. 145 (plaintiff's husband was killed at a level crossing. The question as to his status while on the crossing was ruled irrelevant).

[38] Ibid.

[39] Ashdown v. Williams [1957] 1. Q.B. 409 (the pedestrian plaintiff was injured by a shunted freight car while traversing a level crossing on private property. A warning sign indicating that all persons on the property were there at their own risk was considered adequate warning even though the plaintiff had not taken the trouble to read all of it).

[40] Fleming, op. cit., p. 433.

[41] Rogers v. Toronto Public School Board (1897) 27 S.C.R. 448 (where a contractor visited the premises on the evening before the day for which arrangements had been made for the delivery of some coal. He fell into a furnace pit. Because he voluntarily visited the premises for his own purposes without prior notice to the occupants, he assumed the risks of the condition of the premises).

[42] Fleming, op. cit., p. 433.

must take steps to show that he resents and will try to prevent the invasion, but is not obliged to resort to every possible stratagem to keep intruders out."[43] A person may also become a trespasser after having entered the premises as an invitee or licensee, by the act of entering some unauthorized area or using some improper conduct.[44]

Though the occupier must show that he has not given his consent to the entry of his property, he must not set intentional traps for trespassers.

> Except as a reasonable measure of self-protection, an occupier is not permitted to alter the condition of the land so as to create deliberately a source of danger to others, even if they are unwanted intruders.[45]

Persons other than the occupier owe as high a duty of care to a trespasser as to any other class of person provided that his presence should have been anticipated, on the principle of favoring landholders and not penalizing intruders.[46] On the other hand,

> An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at

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[45]Fleming, op. cit., p. 435; Baldrey v. Fenton (1914) 6 W.W.R. 1441, 29 W.L.R. 258, 7 Sask. L.R. 203, 20 D.L.R. 677 (trespassing horse injured in open well. It was not an allurement or trap).

[46]Buckland v. Guildford Gas Co. [1949] 1 K.B. 410 (a thirteen year old girl was electrocuted when she climbed a tree over which passed a high voltage line which was not visible from below due to the heavy foliage. Even though she was at the time a trespasser on the property, this fact was not relevant to the case as the electric company was not the occupier, and should have recognized that the tree was a temptation to any child on the nearby footpath and thus was an allurement and a trap); LeBlanc v. City of Moncton (1962) 33 D.L.R. (2d) 395 (firemen

> least some other act done with reckless disregard of the presence of the trespasser.[47]

The occupier's responsibility would seem to be that

> . . . in a situation where one person may likely cause injury to another, that after he becomes aware, or should have become aware of the likelihood of the injury he must give his best efforts with the means at hand in an attempt to rescue that other (even a trespasser or one contributing to the collision) from his prospective injury.[48]

Furthermore there is no difference in the duty owed an adult trespasser and an infant trespasser.[49] The duty does change however, if through the action of the occupier, the condition of the premises is changed

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burning grass in a vacant lot failed to extinguish fire on leaving. A 5 year old girl, who had been warned by firemen to stay away, was burned when she tried to stamp out the fire. The fact that she was a trespasser was not relevant because the firemen were not the occupiers and thus owed her a high duty of care); Nixon v. Manitoba Power Commission (1950) 21 D.L.R. (2d) 68 (where a young boy was swinging on a loose guy wire from a power pole. The wire came in contact with the power line and the insulator failed to function resulting in severe burns to the boy. The power pole was near a footpath. The power commission was negligent in having failed to adequately inspect and make repairs).

[47]Addie v. Dumbreck [1925] A.C. 358, 365 (in which a 4 year old boy was crushed by a large wheel of a haulage system belonging to the colliery company. The boy was a trespasser, and the company owed him no duty of protection against risks which were present upon his entry).

[48]Honke v. Manitoba Eastern Railway Company [1938] 2 W.W.R. 520, 524. (A two year old boy playing on the tracks was struck by a train. The engineer and conductor had done everything possible to prevent the injury and thus there was no negligence).

[49]Storms v. Winnipeg S.D. No. 1 (1963) 44 W.W.R. 44, (1963-64) 41 D.L.R. (2d) 216. (An eleven year old boy was struck on the head by a descending fire escape on which a companion was playing); Haines v. Brewster [1938] 2 W.W.R. 285. (Here, a six year old girl fell into an excavation and suffocated under the debris which had fallen on top of her. The area had been marked off and children had been chased away by the contractors).

after he becomes aware of the presence of the trespasser.[50] It is likely too, that the knowledge of the presence of intruders being "very probable"[51] would be sufficient to demand a duty to take at least some additional care.

7. The Standard of Care Due to Children

That there is no difference in the standard of care due to adult trespassers and infant trespassers was mentioned in the preceding section.[52] This treatment of children has, however, not been acceptable to many of the courts and they have subsequently resorted to raising the status of children to licensees whenever the circumstances have made this possible.[53] In order to do this they have applied the idea of "allurement" to situations which would be considered trespass where

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[50]Mourton v. Poulter [1930] 2 K.B. 183. (Where the defendant continued to chop down a tree even though he was aware of the return of children to play on the grounds).

[51]Commissioner for Railways v. Quinlan [1964] A.C. 1054, [1964] 1 All E.R. 897, (this is inferred from this decision in which it was decided that in this case it was not very probable that the presence of the plaintiff's truck was known or should have been expected); Commissioner for Railways (N.S.W.) v. Cardy [1960] 104 C.L.R. 274 (in which a fourteen year old boy stumbled into some hot ashes on the railway property. It was held that he was a trespasser, but, that as the railway knew of the probability of persons being in the area, they had at least an obligation to warn people of the danger).

[52]Storms v. Winnipeg S.D. No. 1, supra, p. 82, and Haines v. Brewster, supra, p. 82.

[53]Fleming, op. cit., p. 444.

adults were involved. As Holmes J. puts it:

> Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult.[54]

This practice is by no means universal and decisions since that time have fallen in the other direction.[55] Consequently decisions involving trespassing children and the possibility of allurements are one of the more difficult and uncertain areas to deal with and pose a most serious type of situation to the physical educator.[56] One must

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[54]United Zinc & Chemical Co. v. Britt (1921) 258 U.S. 268, 275 (two boys entered an unused factory area and were poisoned in a pool of clear water which contained sulphuric acid left over from some former plant. There was no evidence that the water could be seen from any place where the children lawfully were so that it could have lured them onto the land).

[55]Graham v. Eastern Woodworkers (1959) 18 D.L.R. (2d) 260 (where a 9 year old boy was injured when he climbed onto the top of a railway car on a siding below a power cable, and his head touched the cable).

[56]Cooke v. Midland Railway [1909] A.C. 229, 238 (a 4 year old boy was injured while playing on an unlocked turntable to which he had gained access through a well-worn hole in the fence which the railway was bound to maintain by statute); Bouvier v. Fee [1932] 2 D.L.R. 424 (where a 7 year old boy got his hand caught in a cement mixer situated in a back alley and left unattended by the workmen. It was well known that young children used the alley and an adjacent vacant lot to play in, and the cement mixer was thus considered an allurement); Chapman v. Amos (1959) 18 D.L.R. (2d) 140 (defendant left a tin of sodium nitrate in his back yard where young children were accustomed to play. Children found it, punched holes in the can and ate the contents which resulted in the death of a 2 1/2 year old child and a serious illness of two others); Glasgow Corp. v. Taylor [1932] 1 A.C. 44 (where a shrub bearing very poisonous berries was planted in a public park, frequented

therefore, exercise caution in the supervision of potentially dangerous pieces of equipment such as rings, ropes and trampolines.

Infant licensees must be treated somewhat differently than adults as the licensor must give consideration to the mental and physical powers of the licensee as he knew or ought to have known them to be at the time the license was granted.[57] This need not be carried to a point of ridiculousness however, as licensors do not have to provide for children who are so young that they ought to be directly supervised by

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by young children, in a place easily accessible to the children. A seven year old ate some of the berries and died. The berries were considered a temptation and an allurement).

[57]Longo v. Board of Education of City of New York, 235 App. Div. 733, 255 N.Y.Supp. 719 (1932). (In this case a boy entered an unlocked gymnasium which was unsupervised, climbed onto a basketball backstop, fell off and was killed. The board was not liable. One can speculate as to the consequences had there been a trampoline on the floor, from which he fell and was killed. In the present case it was stated:

> "The movable basketball backstop upon which the deceased climbed and which he toppled over was not inherently dangerous. It was a type commonly possessed and used. Its possession and use by the defendant, there being no defect in it, breached no duty to the deceased on either the theory of negligence or nuisance. It obviously was not to be used for climbing purposes, and defendant was not required to anticipate it would be so used by one who had been forbidden to enter the gymnasium in which it was located and who therefore was a trespasser. The failure to exclude decedent from the gymnasium by locking the door was an act of omission the defendant may not be held liable. A similar view must be taken of the fact that the apparatus was not bolted to the floor by a teacher or employee. The apparatus was in completed condition for such fastening if its retention in one place was desired. The bolts (which apparently were not screw bolts) were intended to arrest lateral movement which would take place upon pressure exerted upon the side of the apparatus because of the casters under it, placed there to enable its movement to and from the place marked upon the floor in connection with its use in a basketball game. Accordingly, a prima facie case in negligence or

their parents against perils which they are not able to comprehend.[58]

8. Lessors and Lessees

The responsibility for the condition and safety of the premises lies with the occupier rather than the landlord, and the lessee must in general, take the premises as he finds them.[59] Thus it becomes the responsibility of the tenant to make himself familiar with the premises immediately, and take steps to correct any unsafe conditions.[60] Even

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nuisance was not established"); Purkis v. Walthamston Borough Council (1934) 151 L.T.Rep. 30, (where a 12 year old boy fell from a swing and was injured when struck by the returning swing. It was found that he fell off as a result of fainting which he was prone to do. The recreation authority was not responsible to provide supervision of a nature and extent as would have prevented this accident).

[58]Hastie v. Edinburgh Magistrates [1907] S.C. 1102, (a 4 year old child fell into a pond in a public park); Dyer v. Ilfracombe Urban School District [1956] 1 W.L.R. 218, [1956] 1 All E.R. 581 (a 4 1/2 year old boy fell off a slide in a public park. Boy was accompanied by mother. Slide in good repair. No concealed danger or allurement and no negligence of authority); compared with the finding in Bates v. Stone Parish Council [1954] 3 All E.R. 38 (where the slide was defective in that the restraining rails on the platform left a gap 13 1/2 inches square through which a 4 year old boy fell and as a result of the injury was blinded. A similar accident had occurred 20 years earlier and the additional rails which had been installed at that time had since disappeared. The slide was considered an allurement and the council was liable to damages).

[59]Iannone v. Grassby [1922] W.W.R. 1189, 32 Man L.R. 164, 68 D.L.R. 100 (damage by escaping steam).

[60]Rogers v. Sorell (1903) 14 Man. L.R. 450, (where water leaked through a ceiling in the plaintiff's store due to a defect in the defendant landlord's building. The plaintiff knew of the defect at the time of renting and did not object, and was thus unable to recover damages).

knowledge on the part of the landlord, of potentially dangerous conditions, does not assign any legal obligation to him to warn the tenant.[61] The one exception to this is where the impending danger has been actively concealed by the lessor,[62] or was on part of the premises also maintained by the landlord himself.[63]

Where there is a condition in the lease which required the landlord to repair, he becomes responsible for any personal injury and property damge in the event of failure to complete the necessary repairs,[64] provided that he had been given actual notice of the defects.[65] This duty however, is owed only to the tenant himself, and not to his family or visitors.[66]

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[61]Fleming, op. cit., p. 449.

[62]Fleming, op. cit., p. 449; Indermaur v. Dames (1867) L.R. 2 C. P. 311, 36 L.J.P.C. 181.

[63]Trott v. Kingsbury [1923] 3 W.W.R. 1061, 17 Sask. L.R. 582, [1 [1923] 4 D.L.R. 663, (where a charwoman working for a tenant in a building, while carrying water up a stairway used by tenants but under control of the landlord, was injured when one of the steps gave way. She was able to recover).

[64]Fleming, op. cit., p. 450; Elgeti v. Smith [1937] 3 W.W.R. 114, 51 B.C.R. 545, 550, [1937] 4 D.L.R. 199 (defective railing on porch).

[65]Fleming, op. cit., p. 450; Hambourg v. T. Eaton Co. [1935] S.C.R. 430, [1935] 3 D.L.R. 305, (in which the lens of a spotlight above a piano burst during a rehearsal for a recital in the defendant's auditorium and cut the plaintiff's hand. The plaintiff was a licensee and the light was not a trap or hidden peril so he was unable to recover).

[66]Fleming, op. cit., p. 450; Ingle v. Hanson [1947] 2 W.W.R. 698, 63 B.C.R. 481, [1947] 4 D.L.R. 420 (fence fell on child); Ohrn v. Silver [1940] 2 D.L.R. 271 (a piece of plaster from ceiling in hallway fell on wife).

CHAPTER X

DEFENCES TO NEGLIGENCE

1. Improper Case

The obvious basic defence to negligence is being aware of and avoiding those situations which lend themselves to negligent action. One of the underlying purposes of this thesis is an attempt to point out this type of situation in order that the practitioner can more easily recognize and avoid them. An earlier section discussed the three parts of negligence and suggested that a negligence action must fail if any of the three cannot be satisfied.[1] This would be a first defence to negligence, and would be one of the first things to be determined if action is to be taken.

Once a statement of claim has been served the defendant should first check the date of application on the statement to ensure that it falls within the required period as set by the Limitation of Action Acts in the various provinces and territories.[2] In event of the statement not having been applied for within the required statutory period, the action must immediately fail.

Assuming the statement has been served within the statutory limits, the defendant or his solicitor should then make an appearance at

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[1] Supra p. 42.

[2] Supra p. 35.

the courthouse from which the claim was issued and indicate that the case will be contested. A statement of defence is then prepared which is submitted to the plaintiff's solicitor. In this statement the defendant might disclaim any part or all of the claim against him and/or claim that the plaintiff too was partially responsible for the damages, or that he voluntarily assumed the risk or injury. These latter points are among the topics of the following sections.

2. Last Clear Chance

A doctrine which has fallen into some disrepute in Canada is that of last clear chance, or alternatively "last opportunity" and "ultimate negligence."[3] "The doctrine affixes with responsibility for damage that party which had the opportunity to avoid the injury and did not avail himself of such an opportunity."[4] This rule can be very

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[3]Beamish v. Argue [1966] 2 O.R. 615 (wherein an oil company employee pumped 471 gallons of oil into a 300 gallon tank causing it to overflow. The pipe on the tank was faulty so that only a faint whistle could be discerned when the tank was full. The employee did not hear the whistle. A faulty furnace in the basement set fire to the oil which had over-flowed and as a consequence there was damage to the building and adjoining ones. The oil company was found 60% responsible and the owner of the tank and furnace 40% responsible. The owner subsequently recovered 60% and all others 100% of their losses. Laskin, J.A. said in his statement: "I approach the issue of apportionment . . . from the background of a conviction that the abandonment of the language of causation . . . dispenses with any need to look hard over one's shoulder for the doctrine of ultimate negligence or the 'last opportunity' rule"); also see R.S.A. 1955, c. 56 s. 7, 8, which are included in this chapter, infra, p. 93, 94).

[4]Jeremy S. Williams, "The Doctrine of Last Clear Chance" (Edmonton: The Faculty of Law, 1968), (Mimeographed).

unfair to one party or another as it may deprive a person from recovering any of his losses,[5] or alternatively shift the entire burden of responsibility to the defendant.[6] And, "if a party, by his own negligent act, deprives himself of the last opportunity to prevent damage he will be treated as if he had had such an opportunity."[7] Lord Penzance has stated the effect of this rule in Radley and Bramall v. London and North West Railway Co.:

> the first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.
>
> But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although the negligence may, in fact, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the

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[5]as in Butterfield v. Forrester (1809) 11 East 60, 103 E.R. 926, (in which a man who was riding his horse as fast as possible through the streets, struck a pole which had been placed by another man at the side of the road while he made repairs to his own horse. As the accident was ultimately due to the violent manner in which the plaintiff had been riding, he was barred from recovery).

[6]as in Davies v. Mann (1842) 10 M. & W. 546, 152 E.R. 588, (where a donkey with his forefeet fettered, was eating grass at the side of the road. A fast-driven wagon and team knocked the donkey down and the wagon crushed it. As it was the act of driving the wagon at too fast a pace that ultimately caused the accident, the defendant was liable for all damages).

[7]Williams, op. cit., as in British Columbia Electric Railway Company v. Loach [1916] 1 A.C. 719, (in this case the company allowed a car with defective brakes to be sent out. The train was travelling at excessive speed and struck and killed the plaintiff's husband who was by his own negligence on the tracks. It was the defendant's original negligent act which deprived the train the opportunity to avoid collision, and thus the company was liable).

> plaintiff's negligence will not excuse him. This proposition, as one of law, cannot be questioned.[8]

The practice of assessing the amount of contributory negligence of the parties involved in an action permits a judge to apportion damages[9] which results in a more just settlement.

3. Contributory Negligence

Contributory negligence refers to the failure of the plaintiff to exercise a reasonable degree of care for his own safety.[10] It does not make any reference to his degree of care towards others or to his part in actually bringing the accident about.[11] Those defendants who attempt to invoke this rule must shoulder the burden of proving the contributory negligence of the plaintiff.[12]

When contributory negligence has been shown, the ordinances or statutes of the territories and provinces delineate the procedure by

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[8]Radley and Bramall v. London and N.W. Railway Co. (1875), 11 A.C. 754, 46 L.J.Q.B. 573, 35 L.T. 637, (in this case the plaintiffs left a railway car which was stacked too high with materials, in the proximity of their bridge, when they knew that the defendants would soon be bringing more cars to that siding. The defendants pushed their cars into the other one, and along the track until the bridge stopped them. Not checking to see what was causing the stoppage, they continued to force the cars along the track, and knocked down the bridge).

[9]Supra, p. 38.

[10]John G. Fleming, The Law of Torts (third edition; Sydney: The Law Book Company of Australasia Pty Ltd., 1965) p. 222.

[11]Ibid.

[12]Ibid., p. 235.

which the damages are apportioned to the contributing parties. The appropriate sections of the Alberta Act[13] are given here, and the acts of other areas can be easily located.[14]

THE CONTRIBUTORY NEGLIGENCE ACT

2. (1) Where by fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

(2) Nothing in this section operates to render any person liable for damage or loss to which his fault has not contributed.

[R.S.A. 1942, c. 116, s. 2]

3. (1) Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree in which each person was at fault.

(2) Except as provided in sections 4 and 5, where two or more persons are found at fault they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of any contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

[R.S.A. 1942, c. 116, s. 3; 1951, c. 16, s. 2]

5. In an action brought for damage or loss resulting from bodily injury to or the death of a married person, where one of the persons found to be at fault is the spouse of the married person, no damages, contribution or indemnity shall be recovered for the portion of damage or loss caused by the fault of the spouse, and the portion of the damage or loss so caused by the fault of the spouse shall be determined although the spouse is not a party to the action.

[1951, c. 16, s. 2]

6. In every action

(a) the amount of damage or loss,

(b) the fault, if any, and

(c) the degrees of fault, are questions of fact.

[R.S.A. 1942, c. 116, s. 4]

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[13]Contributory Negligence Act, R.S.A. 1955, c. 56.

[14]R.S.B.C. 1960, c. 74; R.S.S. 1965, c. 91; R.S.M. 1954, c. 266; R.S.O. 1960, c. 261; R.S.N.B. 1952, c. 36; R.S.P.E.I. 1951, c. 30; R.S.N.S. 1967, c. 168; R.S.Nfld. 1952, c. 159; R.O.Y. 1958, c. 21; R.O.N.W.T. 1956, c. 16.

7. Where the trial is before a judge with a jury, the judge shall not submit to the jury any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof, unless in his opinion there is evidence upon which the jury could reasonably find that the act or omission of the latter was so clearly subsequent to and severable from the act or omission of the former as not to be substantially contemporaneous with it. [R.S.A. 1942, c. 116, s. 5]

8. Where the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof, unless he is satisfied by the evidence that the act or omission of the latter was so clearly subsequent to and severable from the act or omission of the former as not to be substantially contemporaneous therewith. [R.S.A. 1942, c. 116, s. 6]

9. Whenever it appears that a person not already party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as are deemed just. [R.S.A. 1942, c. 116, s. 7]

4. Assumption of Risk - Volenti non fit injuria

The doctrine of volenti non fit injuria which suggests that the injured party voluntarily faced a known risk, is "still relevant to a determination of the defendant's duty to the plaintiff."[15] In the event that it can be shown that a mature plaintiff freely and knowingly did expose himself to a risk, the extent of which he was aware, he cannot recover for damages so incurred.[16] "A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purpose of the game or

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[15]Cecil A. Wright, Cases on the Law of Torts (fourth edition; Toronto: Butterworth & Co. (Canada) Ltd., 1967), p. 561.

[16]Murray v. Harringbay Arena [1951] 2 K.B. 529, [1951] 2 All E.R. 320, supra, p. 77.

competition, notwithstanding that such act may involve an error of judgement or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety."[17] Furthermore, the plaintiff cannot rely on his ignorance of the full extent of the risk to which he exposed himself, as the competitor owes only that duty of care to which he would owe any reasonable spectator who chooses to watch that sort of sport,[18] and indeed, the purpose which the participant has in mind is winning, and not the welfare of someone who might be watching.[19] However, in the event that the participant is

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[17]Diplock, L.J. in Woolridge v. Sumner [1962] 3 W.L.R. 616, [1962] 2 All E.R. 978, 989; (wherein a horse ridden by an expert rider was making every effort to win a race and took a corner too fast. At the corner was a series of tubs and benches behind which was a cinder track. The plaintiff, a cameraman, was standing about 25 feet from the corner near the benches. He had been warned by a club steward that he should not be there when the horses were galloping. (The plaintiff was unfamiliar with horses). The horse went off the track at the corner and behind the series of tubs, injuring the plaintiff. Action was brought against the stadium and the defendant (owner of the horse), and the action against the stadium was dismissed. The defendant was found negligent in that the horse was ridden too fast around the corner, and that it was a mistake to have tried to get back onto the track, as otherwise the injury would not have occurred. On appeal it was held that the speed was a natural part of the sport, and that secondly, the decision to try to bring the horse back onto the track was made in the "agony of the moment" in which there was not time to think).

[18]Hall v. Brooklands Auto-Racing Club [1933] 1 K.B. 205, 214 (where Scrutton, L.J. said, "what is reasonable care would depend on the perils which might be reasonably expected to occur, and the extent to which the ordinary spectator might be expected to appreciate and take the risk of such perils"); as compared with Chubaty v. McCulloch (1955-56) 17 W.W.R. (N.S.) 1, [1955] 5 D.L.R. 520 (which involved a soap box derby during which a "car" went out of control and hit some bystanders. The defendant sponsors were held liable as they had no legal right to the street and no right to invite people to watch. Thus the derby constituted a nuisance and the defendants were negligent).

[19]Woolridge v. Sumner, op. cit., (where Diplock, L.J. said ". . . a reasonable participant will concentrate his attention on winning, and

engaged in activity which is improper conduct in that sport, he is entirely responsible for the consequences of his actions as they may affect spectators.[20]

Improper actions of one player which affect another player "should be considered in mitigation."[21] Bastin, J. states:

> Hockey necessarily involves violent bodily contact and blows from the puck and hockey sticks. A person who engages in this sport must be assumed to accept the risk of accidental harm and to waive any claim he would have apart from the game for trespass to his person in return for enjoying a corresponding immunity with respect to other players. It would be inconsistent with this implied consent to impose a duty on a player to take care for the safety of other players corresponding to the duty which, in a

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if the game or competition is a fast-moving one will have to exercise his judgment and attempt to exert his skill in what, in the analogous context of contributory negligence, is sometimes called 'the agony of the moment'").

[20]Payne v. Maple Leaf Gardens Limited, Stewart and Marucci [1949] O.R. 26, [1949] 1 D.L.R. 369. (In this case action was brought against the company and two players for injury sustained by a spectator seated in the front row. The two players had engaged in a fight over a hockey stick. They had both dropped their sticks, and M had recovered his. S, thinking M had his stick, tried to take it away and in the course of the struggle Payne was struck by the stick. It was held that there was no negligence on the part of Maple Leaf Gardens as they had provided reasonably safe premises. M was not negligent as he had done no wrong, nor was he the aggressor at any time. S however, had acted in reckless disregard for the safety of those around, and could easily have avoided the struggle had he looked around and seen his own stick still on the ice. He could not claim that his actions had occurred in the "agony of the moment," as the play had been at the other end of the ice at the time. It is interesting to note that by the time the case had come to court, Maple Leaf Gardens had already installed protective glass above the boards all the way around the arena).

[21]Agar v. Canning (1966) 54 W.W.R. 302, 305 (This is an action from a hockey game in which the following incident occurred: The defendant body-checked the plaintiff and took possession of the puck. As he headed towards the goal, the plaintiff hooked the defendant with

> normal situation, gives rise to a claim for negligence. Similarly, the leave and license will include an unintentional injury resulting from one of the frequent infractions of the rules of the game.
>
> The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse.
>
> But a little reflection will establish that some limit must be placed on a player's immunity from liability. Each case must be decided on its own facts so it is difficult, if not impossible, to decide how the line is to be drawn in every circumstance. But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent. I have come to the conclusion that the act of the defendant in striking plaintiff in the face with a hockey stick, in retaliation for the blow he received, goes beyond the limit marking exemption from liability.[22]

The practitioner must particularly be concerned with the amount of instruction and supervision which is required. This of course, must vary with the nature of the activity and the maturity of the participants.[23] The headnote of a case involving an injury in a gymnastics class says:

> A Board of Education will not be liable for damages sustained by a pupil in one of its schools while participating of his own free will in gymnastics exercise, without proof of negligence on the part of the Board or its employees contributing to the accident. It is not negligence to permit a pupil to take part in

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his stick in an effort to delay him, and in the process struck the defendant "a painful blow on the back of the neck." Defendant thereupon stopped, turned, and holding his stick with both hands, brought it down on plaintiff's face, hitting him with the blade between the nose and the right eye. I find that he did this in retaliation for the blow he had received. It was held that the plaintiff was contributorily negligent, and could only recover for 2/3 of the damages assessed, or $3,910).

[22] Ibid., p. 304.

[23] Dyer v. Board of School Commissioners of Halifax [1956] 2 D.L.R. 394 (where a boy lost his eye as a result of an acorn thrown in

> an exercise in which there is an element of danger if he has been progressively trained and coached to avoid such danger and the exercise is one reasonably suitable to his age and condition, physical and mental.[24]

In a case arising from an accident in an unsupervised grass hockey game it was said that "the mere possibility of injury resulting from a game is not sufficient to establish a breach of duty, especially when it is not shown that supervision could have prevented injury to a child from another player's breach of the rules."[25] In another case, no instruction had been given, but the activity was supervised and not inherently dangerous.[26] The teacher was not liable for the injury which occurred.

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the schoolyard during the noon recess. There was adequate supervision and no negligence or liability was assigned).

[24]Murray v. Board of Education of the City of Belleville [1943] 1 D.L.R. 494, [1943] O.W.N. 44, (in which a 12 year old boy suffered a broken wrist during a physical education lesson involving pyramid building. There was no negligence).

[25]Gard v. Board of School Trustees of Duncan [1945] 3 W.W.R. 485, [1946] 1 D.L.R. 352, reversed [1946] 1 W.W.R. 305, [1946] 2 D.L.R. 441, (in which one 11 year old boy "obstructed" another by passing from the left to right of the boy controlling the ball. He then used a "high-sticking" motion in an attempt to block the ball, and the backswing of the stick struck the plaintiff in the eye. The teacher and board were exonerated. An interesting aspect of this case is that the board attempted to block the action through a limitation of action clause in the Public School Act, R.S.B.C. 1960, c. 319, s. 104 which required that notice in writing of intention to bring action against the board must be given within four months of the act committed); Butterworth v. The Collegiate Institute Board of Ottawa [1940] 3 D.L.R. 446, [1946] O.W.N. 332 (where a 14 year old boy was injured when he failed to clear a vaulting horse. At the time the class was under the supervision of two senior boys as the physical education instructor was otherwise involved. The plaintiff knew that he was "clumsy" and that the instructor had never asked him to attempt this feat. The Board was exonerated).

[26]Hall v. Thompson [1952] 4 D.L.R. 139, [1952] O.W.N. 478, (where the children in a physical education class were matched in a series of one minute wrestling bouts. The plaintiff was taken down by his

The nature and quality of the instruction given a student, even though he may have signed a waiver against accident while in training, cannot be negligent or the student is eligible to recover.[27]

5. Res Ipsa Loquitur

In the event that the defendant maintained control of the situation in which it appears that there could have been no injury in the absence of negligence, the plaintiff may plead res ipsa loquitur, and thus shift the responsibility of disproving negligence to the defendant.[28] This principle is discussed fully in Chapter V.[29]

6. Reasonable Discipline - in loco parentis

A school teacher has the privilege and duty to take care of his students as would the "careful father of a large family."[30] This duty

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opponent and received a broken arm in the process. There was no absence of care on the part of the teacher and the case was dismissed).

[27]Sanford v. Hemphill Diesel Engineering Schools Ltd. [1937] 1 W.W.R. 220, 51 B.C.R. 268. (In this case a student lost the sight of one eye as the result of an explosion brought about through the negligence of his instructors); Smiles v. Board of Trustees of Edmonton [1918] 3 W.W.R. 673, 14 Alta.L.R. 351 reversing [1918] 2 W.W.R. 586 (the Board was not liable for an accident sustained on a dangerous power saw during an examination by the Department of Education. The eighteen year old student knew his capabilities and lack thereof and also was aware of the dangerous nature of the machine).

[28]Colvilles, Ltd. v. Devine [1969] 2 All E.R. 53 (when an explosion at a steelworks scared an employee so that he jumped off a platform and sustained injuries. As the explosion should not ordinarily have occurred, res ipsa loquitur applied requiring the company to disprove its negligence. The company was liable).

[29]Supra, p. 53.

[30]McKay v. Board of Govan School Unit, supra, p. 1; or to use

does not impose a responsibility to protect the children from all possible perils,[31] but rather to effect a discipline suitable to the

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the time honored description of Mr. Justice Cave in Williams v. Eady (1893) 9 T.L.R. 637, 10 T.L.R. 41: "The schoolmaster was bound to take such care of his boys as a careful father would take care of his boys and there could not be a better definition of the duty of a schoolmaster. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts and their propensity to meddle with anything that came in their way"); Durham v. Public School Board of North Oxford (1960) 23 D.L.R. (2d) 711, 717 (in this case the Board was not responsible when a 10 year old boy picked up a piece of spring wire lying on the schoolground, and while swinging it, it went into his eye); Koch v. Stone Farm School District [1940] 1 W.W.R. 441, [1940] 2 D.L.R. 604 (in which it was held that the board was not liable for injuries sustained when a 12 year old boy jumped from a one-story woodshed and broke his leg. He had been warned to stay off the shed); Butterworth v. The Collegiate Institute Board of Ottawa, op. cit., s. 23); Adams v. Board of School Commissioners of Halifax [1951] 2 D.L.R. 816, 27 M.P.R. 232), a fight broke out at recess and stones were thrown. The plaintiff, a bystander, was hit and lost his eye. The supervising teacher was breaking up another fight at the time of the accident. It was held that there was no negligence); Portleance v. Board of Trustees of R.C.S.S. of Grantham (1962) 32 D.L.R. (2d) 337 (The Board was not liable when two students were blinded as a result of running into a hawthorne thicket on the schoolgrounds. Supervision was considered adequate).

[31] Jeffery v. London County Council (1954) 119 J.P. 43, (1952) 52 L.G.R. 521 (where a 5 year old climbed onto the glass roof of a lavatory after class dismissal. He fell through and died from the resultant injuries. The plaintiff father maintained that adult supervision should have been present until the children had all left the school premises. The judge disagreed saying that children under 5 in a nursery school should have constant adult supervision, but not 5 year olds); Scoffield v. Public School Board of North York [1942] O.W.N. 458 (where a 12 year old girl was tobogganning on a hill in the school grounds, fell off and was injured. It was held that no reasonable amount of supervision could have prevented the accident, and that the supervision was adequate); Rawsthorne v. Ottley [1937] 3 All E.R. 902, 905, (where a boy had his leg crushed when he jumped onto a dump truck which was leaving the schoolyard. There was no negligence found. Hillberry, J. said: "In my view it is not the law and never has been the law that a school teacher should keep boys under supervision during every moment of their school lives); Clarke v. Bethnal Green Borough Council (1939) 55 T.L.R. 519 (where one girl who was hanging onto the underside of a diving board, let go causing the plaintiff who was standing on the board, to be projected onto the edge of the pool. It

age and maturity of the children involved, and according to the circumstances of the situation.[32]

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it was held that there was no negligence in the supervision provided at the time of the accident); Rich v. London County Council [1953] 2 All E.R. 376, [1953] 1 W.L.R. 895 (where a piece of coke from a heap stock piled in the school yard was thrown by one of a group of children, and as a result the plaintiff lost his eye. It was held that the supervision was adequate for the age of the boys involved).

[32]Clark v. Monmouthshire County Council (1954) 118 J.P. 244 (where two boys tried to take a sheath knife away from a third boy during the morning recess on the last day of school, and in the scuffle the plaintiff's leg was slashed so that it had to be amputated. It was held that the supervision was adequate and that there was no negligence on the part of the education authority or its servants); Camkin v. Bishop [1941] 2 All E.R. 713 (where a 14 year old boy was injured by a clod of earth thrown by another boy while they were helping a farmer on a school holiday. There was no neglect of duty); Fryer v. Salford Corporation [1937] 1 All E.R. 617 (where the defendant was liable for injury received by an 11 year old girl at a cookery school, as they had failed to provide a guard for a gas stove); Webb v. Essex County Council Times Educational Supplement, 12 November 1954 (where a 5 year old was jumping from an agility stool, and the supervisor was 14 feet away. As the apparatus was safe, there was no negligence); Ricketts v. Frith Borough Council (1943) 2 All E.R. 629 (In this case a 10 year old boy bought a small bow and blunt arrow for a penny at a store across from the school. Returning to the crowded schoolyard, he accidently discharged the arrow in close proximity to a 6 year old girl, breaking her glasses. A glass splinter pierced her eye and she lost the eye. It was held that the school was not negligent in its supervision, nor was the storekeeper negligent in having sold the toy); Schultz v. Grosswold School Trustees [1930] 1 W.W.R. 579, [1930] 3 D.L.R. 600 (where a faulty teeter-totter caused a 6 year old to fall and break his arm. The supervision was adequate but the board was liable for having failed to provide safe premises); Walton v. Vancouver Board of School Trustees [1924] 2 D.L.R. 387, 34 B.C.R. 38, [1924] 2 W.W.R. 49 (where the Board failed to provide suitable equipment and supervision at a rifle shooting competition); Toronto Board of Education v. Higgs [1960] S.C.R. 174 (Where the 15 year old plaintiff was hurt while engaged in some rough play on the school ground. One teacher offered assistance and it was refused. A second teacher ordered the boy into line when the bell rang and made him walk into class. The walking aggravated a minor hip dislocation. It was found that there was no negligence in the supervision provided, but that there was negligence in the care given to the injured boy); Ralph v. London County Council (1947) 63 T.L.R. 546 (a 14 year old boy was injured while playing tag in the physical education class in the

As Mr. Justice McNair said:

> A balance must be struck between the meticulous supervision of children every moment at school and the desirable object of encouraging sturdy independence as they grow up.[33]

School authorities must assume some responsibility for the safety of persons who are not connected with the school, but may be affected by the actions of its students.[34] Recreation authorities enjoy similar status regarding their responsibilities in providing safe places[35]

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gymnasium. One wall of the gym was entirely glass and he put his hand through a panel. It was held that this was an unsuitable game for such a place); but compare with Cahill v. West Ham Corporation (1937) 81 S.J. 630 (where a 14 year old boy put his arm through a glass partition during a relay race. The children had been instructed to touch the supervisor and not the partition, as they turned at the end of the hall. There was no negligence assigned to the defendants); Wray v. Essex County Council [1936] 3 All E.R. 97, (where a boy 12 years old was running in a hallway carrying an oilcan. He collided with another boy at a blind corner and the spout of the can pierced the boy's eye. The board and teacher were not negligent as the can was not inherently dangerous).

[33] Jeffery v. London County Council, op. cit.

[34] Lewis v. Carmarthenshire County Council [1955] 2 All E.R. 1403, [1955] A.C. 549, supra p. 65.

[35] Bates v. Stone Parish Council [1954] 3 All E.R. 38 (where a 3 year old child fell through the bars on the platform of a slide. The council was liable for damages); Dyer v. Ilfracombe Urban District Council [1956] 1 W.L.R. 218 (where the facts are almost identical to the above, though the child was four and one half years old); Stevenson v. Glasgow Corporation [1908] S.C. 1034 (where the corporation was not liable for failing to fence a river in a park); Kennedy v. Union Estates Limited [1940] 1 W.W.R. 209 (where the owner of a private recreation area was liable for the injuries sustained when a wooden bench collapsed); Finigan v. City of Calgary (1968) 62 W.W.R. 115 (where the defendant was liable for negligence in having failed to remove a tree stump from a footpath); McPhee v. City of Toronto [1915] O.W.N. 150 (where the city was liable when a park bench broke); Stewart v. Cobalt Curling and Skating Association [1909] O.L.R. 667 (where the defendant

and in supervision.[36]

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was liable when a balcony railing broke); MacDonald v. Town of Goderich [1948] O.R. 751 (also where a balcony in a hockey rink was defective); Ellis v. Fulham Corporation 157 L.T. 380, [1937] 3 All E.R. 454 (where the corporation was liable when a boy cut his feet in a park paddling pool).

[36]Desautels v. Regina [1941] 3 D.L.R., [1941] 2 W.W.R. 563 (where the defendant city maintained a slide in one of its playgrounds. Children poured water down the slide to form ice and then slid down on sleds. The infant plaintiff was either pushed or fell down the slide and a large splinter penetrated her. It was held that the city was under no obligation to provide supervision of the slide, and that there was no liability as the plaintiff had failed to prove that the slide had not been maintained in safe condition).

CHAPTER XI

IMPUTED NEGLIGENCE

When, through some formal relationships between two persons, one becomes liable for the negligence of the other, it is called imputed negligence. This situation can arise even though the latter did all that he could to eliminate the possibility of injury. The terms respondeat superior and master-servant relationship are generally better known than imputed negligence.

1. Master and Servant Relationship

This is the relationship which exists between the school board and the individual teacher, or the recreation authority and its employee. In order that this doctrine may apply to protect the employee from liability for his torts, that employee must have committed the tortious act within the scope of his employment.[1] The umbrella of the master-

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[1] R.F.V. Heuston, Salmond On The Law of Torts (fourteenth edition; London: Sweet & Maxwell, 1965) p. 648; John G. Fleming, The Law of Torts (third edition; Sydney: The Law Book Co. of Australasia Pty Ltd., 1965), p. 346; Cooper v. Manchester Corporation, The Times, 13 February 1959, (A 14 year old girl was carrying a pot of tea to the staff room when she collided with a small boy and was scalded. It was claimed that she was engaged in a dangerous activity, because the corridor was narrow, had many doors opening onto it and had three blind corners. It was also claimed that it was beyond the teacher's scope of employment to have asked the girl to do such a thing. On appeal, it was held that this could be considered part of the girl's schooling and there was no negligence); Smith v. Martin [1911] 2 K.B. 775 (Similar facts to the a above case. See supra p. 24); as compared with Gray v. McGonegal [1952] 2 D.L.R. 161, [1952] 2 S.C.R. 284, [1950] 4 D.L.R. 395, [1950] O.R. 512, [1950] O.W.N. 475, [1949] 4 D.L.R. 344, [1949] O.R. 749, [1949] O.W.N. 127 (Where a 12 year old boy was asked to light a gasoline stove in order to heat some soup. He said he did not know how, but was told to

servant relationship extends only so far as those over whom the master can exercise control,[2] and therefore does not include any independent contractor. Thus, as an example, one would be responsible for the negligence of his chauffeur who ran someone down, but not for his taxi driver who has committed the same negligent act.[3] The cases cited in the previous chapter were almost all claiming negligence on the part of the servant, yet it was the master who was held liable when negligence was proven.[4]

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do so anyway, and in the attempt was severely burned. The soup in this case, was to have been for the teacher, though on many occasions it was also given to the pupils. It was found that the teacher was acting within the scope of her employment, but that she was negligent in her actions and thus the board was liable for the damages); Levine v. Toronto Board of Education [1930] O.W.N. 152, [1933] O.W.N. 238 (where a boy broke his leg at school track meet while long jumping. 5 years later he claimed damages. It was held that the meet was within the scope of the curriculum and that the action was begun at too late a date to be permitted); Beauparlant v. The Appleby Separate School Trustees [1950] O.W.N. 286 (the principal allowed the pupils of two grades a half-day holiday so they could attend a concert at a town nearby. The 69 pupils were loaded into the back of a truck to be transported the 11 miles. The truck box measured 12 feet by 7 feet and had wooden sides. One teacher accompanied the students in the truck. On the way a side of the box broke and a number of the children fell out and were injured. Action against all other defendants other than the school board was discontinued before the trial. It was held that it was outside the scope of authority of the teachers and principal to organize such an outing and thus the school board could not be liable. An action against the teachers had been dropped, and thus there was no liability.

[2]Fleming, op. cit., p. 340.

[3]Heuston, op. cit., p. 649.

[4]Supra, Chapter 10. However, in Necula v. Ducharme [1963] 38 D.L.R. 736 and Semtex, Ltd. v. Gladstone [1954] 2 All E.R. 206 the defendant who was vicariously liable was able to recover losses through a suit against its employee, based on the Tortfeasor's Act, R.S.A., c. 336, s. 4 and the Law Reform Act 1935, s. 6 (1) (c) respectively. Use of this act has not been made in a suit against a teacher by his Board as yet, but a successful action would essentially eliminate the

A situation which often troubles coaches is regarding their legal status if they use their own vehicle to transport a team from place to place for competitions. One might argue that the person was engaged as a coach and not as a chauffeur and therefore he acted outside the scope of his responsibility. On the other hand, part of a good coaching job is to involve the competitors in some competition and thus it should be considered part of the job to transport the team members to competitions. The only reasonable solution seems to be that, unless the situation is officially dealt with by the employer in a handbook or by some other means, that the coach would be advised to secure written permission from his staff supervisor, to use his own vehicle for this or similar purposes. The same suggestion is given for any other situation wherein the individual is uncertain of his authority to act.

2. Unpaid Servants

> One may be the servant of another although employed not continuously, but for a specific transaction only, and even if his service is gratuitous or de facto merely. The relationship of master and servant is commonly a continuing engagement in consideration of wages paid; but this is not essential. One person may be the servant of another on a single occasion and for an individual transaction, provided that the element of control and supervision is present. . . . The test of service is not physical control, but the right to control.[5]

This would be the situation which very often occurs in the recreation setting, where either a volunteer or part-time employee is engaged

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principle of The Master-Servant Relationship. Three other Provinces have similar statutes: R.S.M. 1954, c.266, s.3 (c); R.S.N.B. 1952, c.2 c.233, s.2 (c); R.S.N.S. 1967, c.307, s.2 (c).

[5]Heuston, op. cit., pp. 653-654.

to handle some aspect of program. An example of the situation in a school setting was given in the preceding chapter, and if the student supervisors had been negligent the Board undoubtedly would have been liable.[6]

3. Independent Contractors

Because of the control factor discussed above, an employer is generally not responsible for the torts committed by an independent contractor during the course of work for which he has been engaged.[7] What the employer is liable for, is any breach of his own duty to the plaintiff[8] as opposed to some duty owed by his independent contractor. This is generally referred to as a "non-delegable duty,"[9] as the employer "cannot acquit himself by exercising reasonable care in entrusting the work to a reputable contractor but must actually ensure

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[6] Butterworth v. The Collegiate Institute Board of Ottawa, supra p. 97, (where a boy was injured through his own negligence while vaulting, when two senior students were supervising).

[7] Fleming, op. cit., p. 357; Heuston, op. cit., p. 686.

[8] Heuston, loc. cit.; Renwick v. Vermillion Centre School District Trustees (1910) 15, W.L.R. 244, 3 Alta. L.R. 291 (where a servant of the school district directed an independent contractor to dump dirt from an excavation for a new school, in a depression in the road and on adjoining land. This resulted in the plaintiff's basement flooding as water was no longer able to run off. The servant gave the orders within the scope of his employment, and thus it was the school district which was liable).

[9] Heuston, loc. cit.; Fleming, op. cit., p. 358.

that it is done and done carefully."[10] Therefore what the court must ascertain is whether or not the employer himself owed a duty directly to the plaintiff. Salmond divides this action into the categories of "a duty to take reasonable care" and "a duty to see that care is taken."[11]

The duty to take reasonable care is no more than simply that duty imposed by the law of negligence. Thus if an act required some technical skill or knowledge the duty of the employer is to take care

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[10]Fleming, op. cit., pp. 358-359; Cassidy v. Ministry of Health [1951] 2 K.B. 343, 363 (Denning, L.J.: "I take it to be clear law, as well as good sense that, where a person is under a duty to use care he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services"); and Dalton v. Angus (1881) 6 A.C. 740, 829 (Lord Blackburn: "A person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it"); Shrimpton v. Hertfordshire County Council (1910-11) 104 L.T. 145 (in this case a 12 year old girl fell while getting off the school van and was injured. The driver, who was negligent in having failed to assist the children from the van was an independent contractor. The injured girl was not officially entitled to ride on the van as she lived within a mile of the school. The appeal court held that the council was liable as they had not provided safe means of transport, and further Lord Atkinson said: ". . . that if a statutory duty to do a particular thing is imposed upon a public body, they cannot protect themselves by contracting with a contractor to do that thing if there is negligence in course of doing it); Cochrane v. Elgin Consolidated School District[1934] 2 W.W.R. 409, 42 M.R. 257 (where a school van overturned due to the negligence of the driver who was considered to be a hired man or servant rather than an independent contractor. The court stated however, that it made no difference what the driver's status was, as the District was still liable).

[11]Heuston, op. cit., p. 687.

to engage a competent contractor.[12] However, it must be shown that the act required some special skill for where an independent contractor's charwoman had failed to properly remove the snow from the school steps the employer was liable as this task did not require any special skill.[13]

When an employer engages a contractor to perform services which are essential under statutory duty, that employer is bound to ensure that the act is carried out safely.[14] Thus where the school or recreation authority is required to provide safe premises, they might for example employ a contractor to replace the light bulbs in a high-ceilinged arena or gymnasium. To do so could require the use of a portable scaffold which within the boundaries of a playing surface could constitute an obvious great hazard to anyone in the vicinity. Thus such operations should be completed during hours when the facilities are

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[12]Heuston, loc. cit.

[13]Woodward v. Mayor of Hastings (1944) 61 T.L.R. 94, [1945] 1 K.B. 174 (DuParcq, L.J.: "The craft of the charwoman may have its mysteries, but there is no esoteric quality in the nature of the work which the cleaning of a snow-covered step demands").

[14]Heuston, op. cit., p. 691: Tyler v. Ardath School District [1935] 1 W.W.R. 337, [1935] 2 D.L.R. 814 (where the contractor was driving some children to school in a horse-drawn van. Through his negligence in harnessing the team, the van overturned in a ditch and the plaintiff broke his arm. The employing board was found liable); Sleeman v. Foothills School Division [1946] 1 W.W.R. 145 (where a school bus and a truck collided causing injury to the plaintiff. Both drivers were negligent, and their employers were therefore equally liable. The driver of the bus however, as an independent contractor, was required to reimburse the school division for the sum which the division was required to pay).

closed, or the working area must be closed to all but the contractor. The employer would be liable for any negligent actions of the contractor within the scope of the contractor's work.[15]

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[15]Heuston, op. cit., p. 694; Fleming, op. cit., p. 362.

CHAPTER XII

NUISANCE

The tort of nuisance appears to be one which, until very recently, has not involved the recreation and physical education authorities to any great extent. This may only be because people are not generally aware of the legal recourse which is available to them to protect their rights, and if this is so, there may be a rise in the amount of nuisance litigation in the future. Therefore this chapter takes the form of more of a warning than a report of past facts.

1. Public and Private Nuisance

There are two classes of nuisance, public and private.[1] Both of them are included in the general rule established in Rylands v. Fletcher[2] by Lord Cranworth that "if a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." The essence of

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[1] R.F.V. Heuston, Salmond on the Law of Torts (fourteenth edition; London: Sweet & Maxwell, 1965) p. 83; John G. Fleming, The Law of Torts (third edition; Sydney: The Law Book Co. of Australasia Pty Ltd., 1965 1965), p. 364.

[2] Rylands v. Fletcher (1868) L.R. 3 H.L. 330, 37 L.J. Ex. 161. (In this famous case, a man employed a competent contractor and engineer to construct a resevoir on his land. In the process they discovered some old mine shafts which they filled with earth. But when the water was put in the resevoir it broke through the earth in the old shafts and escaped into some others of which no one had any knowledge, eventually flooding a colliery. The defendant was liable).

nuisance seems to be that it involves some conflict over the proper and reasonable use of land,[3] and that is is a continuing thing as opposed to an incident in negligence.[4]

Private nuisance is commonly a tort between two parties and, "at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of the neighboring property."[5] The more common sort of claim which is settled under this heading involves the escape of noxious gas, disturbing sounds from factories or race tracks and the like.

Public nuisance on the other hand "confers a cause of action for damages on anyone sustaining personal injury or other loss, although no rights or privileges in land of his have been invaded at all. These situations, typically street accidents, are barely distinguishable from the kind found in ordinary personal injury litigation. . . ."[6] In his claim the individual plaintiff must show that he has suffered some loss or damage which is more than that suffered by the public at large, or else the claim must be in the interests of all affected.[7]

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[3]". . . a man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour." From Heuston, op. cit., p. 85.

[4]Heuston, op. cit., p. 86.

[5]Talbot J. in Cunard v. Antifyre [1933] 1 K.B. 551, 556-557. (Here a piece of eavestrough fell through a skylight into an apartment, and the splintered glass injured the plaintiff).

[6]Fleming, op. cit., p. 366.

[7]Fleming, op. cit., p. 367.

2. Action for Nuisance

Actions of public nuisance and of private nuisance arising out of public nuisance must generally be brought in the name of the attorney-general unless the individual party can show "that he has suffered some particular, direct and substantial damage over and above that sustained by the general public."[8] The term substantial is extremely important to a nuisance action as the harm done must be unreasonable for the action to be successful.[9]

> Reasonableness in the context is a two-sided affair. It is viewed not only from the standpoint of the defendant's convenience, but must equally take into account the interest of the surrounding occupiers. It is not enough to ask: Is the defendant using his property in what would be a reasonable manner if he had no neighbour? The question is, Is he using it reasonably, having regard to the fact that he has a neighbour?[10]

Furthermore, as opposed to negligence, it is not essential that the damage done have been reasonably foreseeable,[11] nor does it matter that the defendant has exercised every possible precaution to prevent the damage.[12]

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[8]Scott, J. in Clare v. City of Edmonton (1914) 5 W.W.R. 1133, 1135, (where the defendant was liable for having emptied sewage into the river upstream of the plaintiff and had thus polluted the river).

[9]"Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected to bear, having regard to the prevailing standard of comfort of the time and place." Fleming, op. cit., pp. 373 and 369.

[10]Fleming, op. cit., p. 373; Heuston, op. cit., pp. 91 and 97-98.

[11]Fleming, op. cit., p. 379.

[12]Fleming, ibid.; Heuston, op. cit. p. 96.

Actions of private nuisance can only be brought by "the actual possessor of the land affected,"[13] whereas in public nuisance anyone affected may initiate the action.[14]

A final point of importance is that in actions for public nuisance, once the existence of the nuisance is shown, the onus shifts to the defendant to excuse himself from liability.[15]

3. Some Example Cases.

There has not been a great deal of litigation in nuisance involving physical education and recreation practitioners or their employers. The cases cited here however, may show the administrator, particularly in recreation, a few of the areas which ought to receive special consideration.

A movie theatre which permitted a queue to form outside while waiting to enter, and thus obstructed the easy access and egress of a neighbouring store was liable and an injunction was obtained prohibiting the formation of similar lines.[16] Situations similar to this could easily arise due to various sporting events and thus the organizers must be prepared to effect arrangements to properly control crowds.

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[13] Fleming ibid.

[14] (Subject to the considerations mentioned above s.8).

[15] Heuston, op. cit., p. 84.

[16] Cahill and Company v. Strand Theatre Company [1920] 3 W.W.R. 650.

An unauthorized soap-box derby on a public highway constituted a nuisance.[17] Similarly, walkathons, parades, and any other activity which obstructed a public highway could be classed as a nuisance and should receive official sanction before being held.

When a stock-car crashed through a fence surrounding a dirt track intended only for horse racing and injured persons in the adjoining park, the defendants were liable in both negligence and nuisance.[18]

A low balance beam, used in a physical education class in a gymnasium with a highly polished floor, slipped causing the 8 year old plaintiff to fall. The court held that the beam on that floor, and without any mats below it, constituted a continuing hazardous condition and thus was a nuisance.[19]

When a high voltage wire sagged over a mound in a public park where children played it was held to be a nuisance.[20]

In Winnipeg a golf club usurped some land which had been zoned and dedicated as a street but had never been developed. When a man built his house on an adjoining lot, he was constantly disturbed by golfers driving balls onto his property and then trespassing in pursuit

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[17] Chabaty and King v. McCulloch, supra, p.94.

[18] Aldridge and O'Brien v. Van Patter, Martin and Western Fair Association [1952] O.R. 595.

[19] Bush v. City of Norwalk (1937) 122 Conn. 426, 189 A 608.

[20] Novak v. Ford City Borough supra, p. 55.

of the lost balls. He was successful in receiving an injunction against the golf club forcing it to cease using the area intended to be a street, and to restore it to its normal state.[21]

Two similar cases arose as the result of the dangerous manner in which golf courses were designed. One of the courses had a fairway parallel to a busy highway and as a result a taxicab driver lost his eye when a sliced ball struck his windshield.[22] In the other case the golf club was situated in a public park and a footpath crossed a fairway between the tee and the green.[23] The danger in these two cases suggests consideration in the construction and management of all sporting facilities and events which involve any objects being projected great distances. One thinks immediately of the obvious danger in some track and field events which necessitate special consideration. In addition, the there have been nuisance actions in both cricket and baseball, which illustrate another type of situation which can lead to liability.

Bolton v. Stone[24] discussed earlier involved an unsuccessful action in nuisance and negligence. Here, the plaintiff was injured by a cricket ball while walking along a seldom-used road adjacent to the cricket pitch. The action was unsuccessful because of the great

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[21]Chiswell v. Rural Municipality of Charleswood and Alcrest Golf Club Limited [1935] 3 W.W.R. 217, [1937] 1 W.W.R. 177.

[22]Castle v. St. Augustine's Links (1922) 38 T.L.R. 615

[23]Erlain v. City of Pittsburgh (1925) 73 Pittsburgh Legal Journal 844.

[24]Bolton v. Stone [1951] A.C. 850, supra, p.60 .

distance between the road and the batter's position, and also because the defendant was able to show that balls had only been known to travel as far as the road a maximum of six times in 30 years.

A very recent Canadian case[25] and some United States cases[26] involve similar conditions arising from baseball games in schoolyards and playgrounds. In each of these cases the property adjoining the playgrounds was repeatedly trespassed upon by children retrieving baseballs, and frequently the baseballs damaged property or injured the occupiers. Hale, J. in referring to the playgrounds said:

> They are not per se nuisances, though, like many other things, they can be so conducted as to become nuisances. As in many other instances, it is not so much the nature of the thing claimed to constitute a nuisance, as the manner of its use of treatment.[27]

And Stiger, J. added that "the playing of baseball on the playground is not a nuisance per se and plaintiff must submit to annoyance incidental to living close to the school premises and arising from a proper use of the playground."[28]

Each of the cases cited in this chapter serve to forewarn the practitioner to consider his neighbour before constructing or operating any athletic facilities.

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[25] Cooke v. Town of Lockport [1969] 3 D.L.R. (3d) 155.

[26] Ness v. Independent School District of Sioux City (1941) 230 Iowa 771, 298 N.W. 855; Casteel v. Town of Afton 227 Iowa 61, 287 N.W. 245, Spiker v. Eikenberry 133 Iowa 79, 110 N.W. 457.

[27] Casteel v. Town of Afton, ibid.

[28] Ness v. Independent School District of Sioux City, ibid., p. 858.

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